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No. 94-625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

D & G MARINE MAINTENANCE, B & A MARINE COMPANY and STATE INSURANCE FUND,

Petitioners,

vs.

SPYRIDON KOLLIAS, ELEFTHERIOS GOUVATSOS and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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September 29, 1994

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Questions Presented

Whether ship repairmen, sustaining injuries arising out of and in the course of their employment while upon the high seas, have sustained injuries occurring "upon the navigable waters of the United States" within the meaning of § 903(a) of the Longshore and Harbor Workers' Compensation Act.

Whether the presumption against extraterritoriality was properly overcome with regard to § 903(a) of the Longshore and Harbor Workers' Compensation Act.

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-v.-

SPYRIDON KOLLIAS, ELEFTHERIOS
GOUVATSOS and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petitioners, D & G Marine Maintenance, B & A Marine Company and State Insurance Fund, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on July 6, 1994. That decision reversed the Benefits Review Board judgment dated July 31, 1989, in the matter of *Spyridon Kollias v. D & G Marine Maintenance, et al.*, denying jurisdiction under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (hereinafter, the "Act"), and affirmed the judgment of the Benefits Review Board in the matter of *B & A Marine Company, et al. v. Eleftherios Gouvatsos, et al.*, dated May 14, 1992, finding jurisdiction under the Act.

Opinions Below

The opinion of the Court of Appeals (Appendix, hereinafter "App.," A), is dated July 6, 1994 and reported at 29 F.3d 67. The decision of the Benefits Review Board of the United States Department of Labor in *Kollias v. D & G Marine Maintenance*, dated July 31, 1989 (App. G) is reported at 22 BRBS 367. The decision of the Benefits Review Board in *B & A Marine Company v. Gouvatsos*, dated May 14, 1992 (App. D) is reported at 26 BRBS 38. The Administrative Law Judge decision in the *Kollias* case was filed on November 15, 1985. (App. H). The Administrative Law Judge decision in the *Gouvatsos* case was filed on December 3, 1981. (App. K).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provision Involved

Section 903(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 903(a) is set forth as Appendix L to this Petition.

Statement of the Case

This case involves two ship repairmen who sustained injuries in separate accidents occurring upon the high seas. Respondent Eleftherios Gouvatsos was employed by petitioner B & A Marine Company. In December 1979, he traveled with four other employees of B & A to Texas City, Texas. There, they boarded the *Amoco Cremona* to effect certain repairs to the vessel. (63a). Respondent remained on board the *Amoco Cremona* to complete repairs after the ship sailed from Texas City on December 15, 1989, to travel to Bagaritos, Mexico. *Id.*

The *Amoco Cremona* left Bagaritos on December 30, 1989, to travel to Galveston Roads, Texas. (63a). On January 1, 1990, respondent Gouvatsos sustained an injury to his right knee while in the course of his repair work. (*Id.*). At the time of the accident, the vessel was in

the Gulf of Mexico, more than two hundred miles from any portion of the United States coastline. *Id.*

Respondent Spyridon Kollias was employed as a ship repairman by petitioner D & G Marine Maintenance. He sustained injuries while performing ship repair operations on board the *T.T. Williamsburgh.* The vessel was en route on a tramp steamer voyage from Galveston, Texas, that would ultimately take it to Curacao, and from there, around Cape Horn to Long Beach, California. At the time of his injury, the vessel was approximately fifteen hundred miles out upon the high seas and more than three hundred miles from the coast of the United States. (51a, 53a).

Both respondents filed separate claims for benefits under the Longshore and Harbor Workers' Compensation Act. The petitioner employers and carrier controverted the claims, raising, *inter alia*, the issue of jurisdiction.

Separate Formal Hearings were held by Administrative Law Judges. In the case of respondent Gouvatsos, the Administrative Law Judge held that the claim came within the jurisdictional provisions of the Act. *Eleftherios Gouvatsos v. B & A Marine Co.*, Case No. 81-LHCA-136 (Dec. 13, 1991).[1] (67a). Following appeals by petitioners,

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[1]The petitioners appealed to the Benefits Review Board from this determination, which appeal was dismissed as premature. Following further proceedings before the Administrative Law Judge, a second Decision and Order was issued on October 9, 1984; this subsequent determination affirmed the original finding of jurisdiction and made

(continued...)

the Benefits Review Board affirmed "the determination of the administrative law judge that claimant meets the situs requirement of Section 3(a) of the Act." *Gouvatsos v. B & A Marine Co.*, 26 BRBS 38 (1992). (36a). The petitioners thereafter filed a Petition for Review to the Court of Appeals for the Second Circuit on July 8, 1992 pursuant to 33 U.S.C. § 921(c), seeking review of the May 14, 1992 Decision and Order of the Board.

In the case of Respondent Kollias, the Administrative Law Judge found that "the Claimant has failed to satisfy the requirements of Section 3(a) of the Act and accordingly, this claim for compensation benefits must be denied." *Kollias v. D & G Marine Maintenance*, 85-LHC-0045 (Nov. 15, 1985). Respondent Kollias appealed the Administrative Law Judge determination to the Benefits Review Board. The Board affirmed the Administrative Law Judge denial of the claim. *Kollias v. D & G Marine Maintenance*, 22 BRBS 367 (1989). (48a). Respondent Kollias appealed this decision to the Court of Appeals for the Second Circuit pursuant to § 21(c) of the Act.

Following oral argument, the Circuit Court issued an Order dated June 26, 1990, remanding the case to the Benefits Review Board. Following further proceedings before the Office of Administrative Law Judges and the Benefits Review Board, and pursuant to the Board's Order of April 22, 1993, the case was transmitted back to the Court of Appeals for its further consideration of the issues

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[1](...continued)
awards to respondent Gouvatsos under the Act.

presented. The two cases were considered together by the court. Following oral argument in *Gouvatsos* and additional oral argument in *Kollias*, the court requested additional briefing on the issue of the presumption against extraterritoriality. Following submission of letter briefs by the parties,[2] and by judgment entered July 6, 1994, the Court of Appeals for the Second Circuit reversed the decision of the Benefits Review Board in *Kollias* and affirmed the Board's decision in *Gouvatsos*. *Kollias v. D & G Marine Maintenance*, 29 F.3d 67 (2d Cir. 1994).

The Court of Appeals found that, although the presumption against extraterritoriality applied to § 3(a) of the Act, the presumption was overcome. The court then concluded:

> Given our conclusion that Congress intended that the LHWCA apply extraterritorially, we interpret the phrase "navigable waters of the United States" in section 3(a) as including the high seas.

Kollias v. D & G Marine Maintenance, 29 F.3d at 75 (2d Cir. 1994). Based upon this finding, the court further held that "[b]ecause the high seas fall within the permissible jurisdictional reach of the LHWCA, the statute covers both claimants' injuries. The Board, therefore, improperly denied Kollias' claim for benefits under the LHWCA and properly granted Gouvatsos' claim." *Id.*

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[2]Respondent Gouvatsos did not participate in either the oral argument conducted before the Court of Appeals or in the submission of letter briefs filed at the court's request following such oral argument.

Reasons for Granting the Writ

The 1972 amendments to the Longshore and Harbor Workers' Compensation Act have engendered considerable litigation concerning the scope of the expanded landward reach of § 3(a).[3] The instant Petition presents the more novel question of whether the phrase "navigable waters of the United States" can properly be construed to include the high seas, thereby defining the seaward scope of the Act.

In its analysis of this issue, the court below raised the question of whether any such construction of the term is barred, *ab initio*, by the application of the presumption against extraterritoriality. In resolving this question, the court not only considered the primary issue of the intent of Congress in enacting § 3(a), but the degree of deference to be granted jurisdictional interpretations of the Act adopted by the Director, Office of Workers' Compensation Programs.

The overriding questions of the proper application of the presumption against extraterritoriality and the seaward geographic limits of the Act raise important, basic issues of statutory construction, the resolution of which are essential for the effective administration of the Act, and of signal

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[3]*See, e.g., Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978); *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir.1980); *Newport News Shipbuilding and Dry Dock Co. v. Graham*, 573 F.2d 167 (4th Cir. 1978); *Humphries v. Director, OWCP*, 834 F.2d 372 (4th Cir. 1987).

importance to both the ship repair and insurance industries. The additional issue considered and passed upon by the court below, *i.e.*, the deference to be accorded the interpretations adopted by an administrative agency in defining its own jurisdiction, while of obvious import to the instant case, is of great significance beyond the confines of the issues presented herein.

I.

In Interpreting the Phrase "Navigable Waters of the United States" to Include Injuries Occurring Upon the High Seas, the Circuit Court of Appeals Has Misconstrued the Clear Language and Intent of 33 U.S.C. § 903(a).

Section 3(a) of the Act defines the geographical scope of the Act. The subsection states, in relevant part, that compensation under the Act shall be payable

> in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 903(a) (1986)

The court below held that respondents Kollias and Gouvatsos satisfied the jurisdictional requirements of the Act by concluding that the term, "navigable waters of the United States," as used in § 3(a) of the Act, included the high seas. *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 75 (2d Cir. 1994). In reaching this conclusion, the court analyzed the jurisdictional scope of the Act in light of the presumption against extraterritorial application of Congressional enactments. The court concluded:

> In light of the express reference to the high seas in section 39(b) of the LHWCA, congressional intent to provide consistent coverage for longshore and harbor workers and the Director's interpretation [of § 3(a) of the Act], we conclude that the presumption against extraterritoriality is overcome in the LHWCA. Accordingly, the statute may be applied beyond the territorial jurisdiction of the United States, including on the high seas.

Id. The court then went on to hold:

> Given our conclusion that Congress intended that the LHWCA apply extraterritorially, we interpret the phrase "navigable waters of the United States" in section 3(a) as including the high seas.

Id.

The court's interpretation of the phrase "navigable waters of the United States," both in terms of its preliminary consideration of the presumption against

extraterritoriality and with regard to the statute itself, misconstrues the language of the Act and the Congressional intent underlying the statute.

In *P.C. Pfeiffer v. Ford*, 444 U.S. 69 (1979), this Court noted that the Act

> . . . contains distinct situs and status requirements. The situs test of § 3(a) allows recovery for an injury suffered on navigable waters or certain adjoining areas landward of the *Jensen* line. *This test defines the broad geographic coverage of the Act.*

444 U.S. at 78 (emphasis supplied).

Section 2(9) of the Act states in relevant part that

> [t]he term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

33 U.S.C. § 902(9) (1986). As noted by this Court in *Pfeiffer*, *supra*, section 3(a) plainly employs the term "United States" in a geographical sense, and indeed is the only provision of the entire Act to do so. The interplay between §§ 2(9) and 3(a) plainly demonstrates that Congress employed the Act's sole geographic definition in conjunction with the Act's sole geographic provision by incorporating that definition. The definition of "United States" contained in § 2(9) clearly modifies the usage of the term in § 3(a), and, in fact, *must* modify that usage

unless § 2(9) is to be deemed anything other than mere surplusage.

Turning to the language of § 2(9) itself, the phrase "territorial waters" is clearly a term of art and has a definition which is distinct, both geographically and legally, from the term "high seas." In the *Louisiana Boundary Case*, 394 U.S. 11 (1969), this Court stated:

> Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nations can exercise of them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters and measured from this seaward edge, is a belt known as the marginal, or territorial, sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations. Outside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation.

394 U.S. at 22-23. In *United States v. Hilton*, 619 F.2d 127 (1st Cir. 1980), the Court of Appeals for the First Circuit noted:

> The high seas lie seaward of the territorial waters,

> which extend three miles from the coast. The high seas encompass the contiguous zone (also known as the customs waters) extending three to twelve miles from the coast.

619 F.2d 127 at n. 1.

It is additionally clear that the terms "navigable waters of the United States" and "high seas" were understood as having distinct meanings at the time of the 1927 Act's passage. In *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865), this Court described the requirements of maritime tort jurisdiction by noting that ". . . the whole, or at least the substantial cause of action arising out of the wrong, must be complete within the locality upon which the jurisdiction depends - on the high seas *or* navigable waters." 70 U.S. (3 Wall.) at 36 (emphasis supplied). Citing the decision in the *Plymouth*, this Court noted in *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914) that

> [t]he jurisdiction of the admiralty does not depend upon the fact that injury was inflicted by the vessel, but upon the locality - the high seas *or* navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas *or* navigable waters, is of admiralty cognizance.

234 U.S. at 59-60 (emphasis supplied).

This Court's statement in *The Daniel Ball*, 77 U.S. 557

(1871) to the effect that navigable waters constitute "navigable waters of the United States" "when they form in their ordinary condition by themselves or by uniting *with other waters*, a continued highway over which commerce is or may be carried on with other States or foreign countries" 77 U.S. at 563 (emphasis supplied), does not change the disjunctive usage, but rather serves as a means of determining which of the inland waterways can be deemed federal in their nature. *See also*, *The Montello*, 78 U.S. (11 Wall.), 411, 415 (1871).

The legislative history demonstrates that Congress was aware of the distinction drawn between "navigable waters of the United States" and the "high seas." S. 3170, after being passed by the Senate, provided in § 3(a) that compensation would be payable for disability or death of an employee

> but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) *or occurring while such employee was employed on board a vessel of the United States upon the high seas . . .*

69th Congress, 1st Sess. 67 CONG. REC. at 10608; *To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments: Hearings on S. 3170 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess., 122 (1926)

(emphasis supplied).[4]

It can be presumed that Congress was aware of the geographical and legal differences between the phrases "territorial waters," "navigable waters of the United States" and "high seas" and intended that these distinctions be carried over into the Act. 2A C. D. SANDS, SUTHERLAND STATUTORY CONSTRUCTION 51.02 at 290 (4th ed. 1973). *See also*, *Morrissette v. U.S.*, 342 U.S. 246, 263 (1952) (where Congress defined various criminal offenses, it is presumed that it "knows and adopts the cluster of ideas that were attached to each borrowed [term]"). This presumption is only strengthened by the fact that Congress *did* employ the terms separately in considering the bill. The additional fact that Congress chose, in enacting the statute, to delete § 3(a)'s coverage reference to the "high seas," thus provides strong evidence of its intent *not* to extend coverage to this geographic area.

In its review of the legislative history of the 1927 Act, the Court of Appeals for the Second Circuit characterized the affirmative deletion of the early § 3(a) references to the

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[4]This version of the Senate bill also contained a definition of "employer" in § 2(4) that distinguished between "navigable waters of the United States" and "high seas." Section 2(9)'s definition of "United States" in the proposed bill was identical in content to that contained in the present-day version. The version of S.3170 that was ultimately enacted eliminated the reference to the "high seas." *See discussion* at n.5, *infra*.

"high seas" as "an effort to exclude seamen,"[5] as opposed to evidence of Congress' consideration, and subsequent rejection of, the Act's coverage of the high seas.[6] The court

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[5]While the court below correctly notes that the seamen's representatives did express a desire not to exchange their coverage under the Jones Act, 46 U.S.C. § 688, for a workers' compensation remedy, it fails to note that the version of S.3170 containing the reference to the "high seas" contained a specific exclusion for maritime workers covered under the Jones Act both by the exclusionary use of the terms "master" and "seamen" (§§ 2(3) and 3(a)(1)) and by explicit statutory reference to the Jones Act. As the proceedings in the House on S.3170 demonstrate, the concern regarding the potential inclusion of seamen centered upon the exclusionary definition of "employee" (§ 2(3)) and the identical language contained in § 3(a)(1). 69th Congress, 2d Sess., 68 Cong. Rec., 5402, 5403 (1927)(Remarks of Mr. Graham). Thus, elimination of the § 3(a) reference to the "high seas" accomplished nothing in this regard.

[6]The circuit court's further reference to the Congressional intent underlying the 1972 amendments to create "'a uniform compensation system' in which a longshoreman's or harbor worker's coverage did not depend on the precise site of his injury" 29 F.3d at 74, neglects the fact that the § 3(a) "situs" provisions have continuously been held to establish geographic boundaries to the jurisdiction of the Act. *See, e.g., Sun Ship v. Commonwealth of Pennsylvania*, 447 U.S. 715, 725 (1981) ("[t]he line that circumscribes the jurisdictional compass of the LHWCA - a compound of 'status' and 'situs' - is no less vague than its counterpart in the pre-'twilight zone' Jensen era."). The very nature of drawing boundaries implies that certain individuals will be excluded and others included. It means, in the context of the Act, that certain individuals, clearly satisfying the status test of maritime employment provided by § 2(3) will not be entitled to benefits under the Act due to the situs requirements of § 3(a). Congress' intent to establish "uniform" compensation coverage was an intention to provide uniform coverage

(continued...)

below, in its entire analysis of the statute, made no reference to § 2(9), instead relying upon the administrative and venue provisions of § 39(b)[7] of the Act. The court's decision to base its interpretation upon the ministerial/venue provisions of § 39(b), while ignoring the substantive definitions contained in § 2(9), creates a tension within the Act that should be resolved by this Court.

The issue presented by the lower court's determination, namely the seaward boundary of the Act, would appear to

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[6](...continued)
within the geographic "situs" boundaries, not to eliminate those boundaries.

[7]This section provides that

> The Secretary shall establish compensation districts, to include the high seas and the areas within the United States to which this Act applies, and shall assign to each such district one or more deputy commissioners, as the Secretary deems advisable. Judicial proceedings under section 18 and 21 of this Act in respect to any injury or death occurring on the high seas shall be instituted in the district court within whose territorial jurisdiction is located the office of the deputy commissioner having jurisdiction in respect of such injury or death (or in the United States District Court for the District of Columbia if such office is located in such District).

33 U.S.C. § 939 (b) (1986).

be one of first impression[8] before this Court. The threshold jurisdictional issue presented herein is of signal importance to the proper administration of the Act, to those employees seeking its benefits, to the employers who must choose to obtain security for their obligations under this and other compensation statutes and to the insurance industry which seeks to provide that security.[9] Certiorari should be granted by this Court to resolve this issue.

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[8]The issue has been addressed (if not resolved) in the context of a defense to proceedings under the Jones Act. *See, e.g., Reynolds v. Ingalls Shipbuilding*, 788 F.2d 264 (5th Cir. 1986); *Cove Tankers Corp. v. United Ship Repair, Inc.*, 683 F.2d 38 (2d Cir. 1982); *Marroquin v. American Trading Transportation Co., Inc.*, 711 F.Supp. 1165 (E.D.N.Y. 1988). However, both *Reynolds* and *Cove Tankers* resulted in holdings limited to the facts of the respective cases; both courts declined to conclude that the § 3(a) definition of "navigable waters of the United States" applied for all purposes of the Act.

[9]The Court in *Cove Tankers Corp. v. United Ship Repair, Inc.*, 528 F. Supp. 101, 104 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 38 (2d Cir. 1982) referred to the use of ship repairmen on board while the vessel is at sea ("riding crews"), as "a recently expanded practice" to enable a vessel "to avoid costly time laid up in port."

II.

The Decision of the Court Below, Finding That The Presumption Against Extraterritoriality Has Been Overcome, Conflicts In Principle With Prior Decisions of this Court.

In its analysis of the issues presented herein, the court below first noted that respondents' claim for relief was premised upon the assumption that the Act applied extraterritorially. The Second Circuit correctly noted the principle that "we must presume that Congress intended its enactments to apply only within the territorial jurisdiction of the United States, unless the legislation reflects a contrary intent." *Kollias*, *supra*, 29 F.3d at 70.

In determining that the presumption had been overcome, the court held:

> In light of the express reference to the high seas in section 39(b) of the LHWCA, congressional intent to provide consistent coverage for longshore and harbor workers and the Director's interpretation, we conclude that the presumption against extraterritoriality is overcome in the LHWCA. Accordingly, the statute may be applied beyond the territorial jurisdiction of the United States, including on the high seas.

29 F.3d at 75.

In *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (*Aramco)*, this Court noted that in applying the presumption,

> we look to see whether "language in the [relevant act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Foley Bros.*[10] *supra*, at 285. We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is "*the affirmative intention of the Congress clearly expressed*," *Benz*,[11] *supra*, at 147, we must presume it "is primarily concerned with domestic conditions." *Foley Bros.*, *supra*, at 285.

499 U.S. at 248 (emphasis supplied). Absent a showing of such a clear expression, *Aramco* holds that the presumption must prevail.

A reading of the opinion below plainly demonstrates that the Court of Appeals has effectively modified the *Aramco* standard in such a way as to rob the presumption

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[10]*Foley Bros. v. Filardo*, 336 U.S. 281 (1949).

[11]*Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957).

of its intended effect.

The court below commenced its textual analysis by citing and relying upon § 39(b) of the Act. 29 F.3d at 73-75.[12] Yet, as noted previously, far from clearly expressing an affirmative intention to apply the Act to the high seas, Congress defined the geographic scope of the Act in § 3(a) to the "navigable waters of the United States" and further defined the term "United States" as including the "several States and Territories and the District of Columbia, including the territorial waters thereof." Even assuming, *arguendo*, that the venue provisions of § 39(b) can be seen as expressing an intention to apply the Act extraterritorially, in the presence of §§ 3(a) and 2(9), this intention, relied on by the court below, is hardly "clearly expressed."

To the extent that reference outside the language of the statute itself is proper in determining whether the

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[12]In its opinion, the court below stated that "[n]o plausible explanation exists for section 39(b)'s reference to the high seas other than that Congress intended LHWCA coverage for injuries sustained on the high seas." 29 F.2d at 74. Yet as the legislative history of the 1927 Act demonstrates, § 39(b) as presently constituted was first set forth in the version of the proposed Act containing the § 3(a) jurisdictional language extending coverage to "navigable waters of the United States" or the "high seas." *See discussion* at 13, *supra*. In light of the Act's subsequent history and administration, it would seem equally, or even more, "plausible" to view the retention of the phrase "high seas" in the venue provisions of the Act as an oversight, a failure to coordinate that section with the jurisdictional provision of § 3(a) and the substantive definition of § 2(9). *See discussion* at n.17, *infra*.

presumption against extraterritoriality is overcome, it is clear that the Court of Appeals again misapplied the standard set forth by this Court. In the decision below, the court first cited what it felt to be "Congress' overriding purpose in enacting the LHWCA," namely the goal of providing "consistent workers' compensation coverage to eligible longshore and harbor workers, a goal that would be frustrated by limiting the LHWCA to territorial application." 29 F.3d at 74. Citing to the legislative history underlying the 1972 amendments to the Act, the court went on to note that

> [a] central purpose underlying the LHWCA was thus to create "'a *uniform* compensation system'" in which a longshoreman's or harbor worker's coverage did not depend on the precise site of his injury. [Citations omitted].

Id.

In its citation of "Congress' overriding purpose" noted above, the court unwittingly stated the basic weakness of its interpretation, namely that Congress sought to provide consistent coverage only to *eligible* workers. Those workers injured outside the statutorily defined situs are not eligible just as those within the covered situs who lack "status" cannot seek benefits in the name of "uniformity."

As for the Act's coverage of otherwise eligible workers outside the territorial waters of the United States, the legislative comments accompanying the 1972 amendments,

if anything, demonstrate that Congress did not contemplate coverage under the Act extending to the high seas. In discussing the elimination of the *Sieracki/Ryan*[13] actions for unseaworthiness, the House report noted that

> [t]he Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy *does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is port.*

H.R. REP. NO. 1441, 92d Cong., 2d Sess. 6, *reprinted in*

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[13]*Seas Shipping Co v. Sieracki*, 328 U.S. 25 (1946); *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

1972 U.S.C.C.A.N. 4698, 4703 (emphasis supplied). Plainly, Congress did not intend to eliminate an unseaworthiness remedy for workers who accompany the vessel on its voyage and share in the perils of that voyage. It is equally clear that in enacting the 1972 amendments, Congress intended to eliminate the unseaworthiness remedies of those subject to the Act's coverage and benefits. Therefore, to the extent that the elimination of an unseaworthiness cause of action was a primary purpose[14] behind the Act's amendment in 1972, it would seem clear that Congress did not envision coverage extending to the high seas.

Similarly, the review of the legislative history underlying the original 1927 Act in the decision below reveals nothing more than a choice between conflicting interpretations. The Circuit Court stated:

> Although an early proposed version of section 3(a) of the 1927 LHWCA expressly provided for coverage of injuries sustained on the high seas, *see* S. Rep. No. 973, 69th Cong., 1st Sess. 2 (1926), the legislative history of section 3(a) does not fully explain the ultimate exclusion of that provision. One likely explanation, however, is that Congress intended to exclude all seamen from LHWCA coverage and that Congress

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[14] *See, Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 263 (1977).

> understood the term "seamen" to encompass all workers employed on a vessel on the high seas.

29 F.3d at 74.

The court's own language demonstrates that the claimed intent to include the high seas was neither clear nor clearly expressed. Indeed, as noted previously,[15] the legislative history surrounding the 1927 Act would seem to demonstrate that both the concern of Jones Act workers and the Congress centered on the exclusionary definition of "employee" contained in former § 2(3) and its repetition in former § 3(a)(1).

In *Aramco*, after having considered the varying interpretations of Title VII, this Court noted that

> [w]e need not choose between these competing interpretations *as we would be required to do in the absence of the presumption against extraterritorial application discussed above. Each is plausible, but no more persuasive than that.* The language relied upon by petitioners -- and it is they who must make the affirmative showing -- is ambiguous and does not speak directly to the question presented here.

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[15] *See discussion* at n.8, *supra*.

499 U.S. at 250 (emphasis supplied). Where the language of a statute to which the presumption applies is ambiguous, or suggests alternative interpretations, operation of the presumption against extraterritoriality must compel the conclusion that the statute in question is limited to domestic application. A reading of the opinion below demonstrates that, rather than applying the presumption, the court below simply applied normal rules of statutory construction and did indeed "choose between . . . competing interpretations." This has resulted in the effective nullification of the presumption, a consequence in conflict with the principles set forth by this Court.

The reliance of the court below upon the Director's interpretation of the statute as "overcoming the presumption and . . . applying extraterritorially," 29 F.3d at 75, was improper both in the context of the application of the presumption and with regard to the principle of deference generally.

Deference, as a concept, involves a congressional delegation of administrative authority, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1988), and the reasonable exercise by the agency of that authority rather than evidence of statutory or congressional intent itself. Overcoming the presumption against extraterritoriality involves the discernment of congressional intent. To apply the principle of deference in overcoming the presumption, therefore, "is not a valid approach whereby unexpressed congressional intent may be ascertained," *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949), but instead the

displacement of that intent.[16]

Moreover, the Second Circuit's reliance upon the principle of deference in the instant case was improper and in conflict with decisions of this Court, regardless of the application of the presumption against extraterritoriality. The issues presented in these cases involve the jurisdictional scope of the Act itself. In light of the issues involved, the Director's interpretation of the Act's provisions is entitled to no deference whatsoever. In noting the delegation of authority to the administrative agency in *Adams*, *supra*, this Court held that

> [t]his delegation, however, does not empower the Secretary to regulate the scope

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16

> . . . the idea that statutes generally will apply only within the territory of the United States is an attempt to conform to the reasonable expectations of both the legislature and affected persons. It also performs an important function in sorting out the relations between domestic law and that of other nations. *An administrative agency should not be permitted to displace a principle designed to ensure that if American law is to apply outside of American borders, Congress must say so explicitly.*

Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2115 (1990) (emphasis supplied). *But see*: *Aramco*, *supra*, 499 U.S. at 257-258 (deference considered in the context of overcoming presumption with the level of such deference based upon factors of thoroughness evident in agency's consideration, validity of agency's reasoning, consistency with earlier and later pronouncements, "and all those factors which give it the power to persuade, if not control.").

> of the judicial power vested by the statute. Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental "that an agency may not bootstrap itself into an area in which it has no jurisdiction."

494 U.S. at 650 [citation omitted].

There is no evidence that the Director's interpretation of the scope of the Act's coverage reflects any exercise of delegated authority by Congress, and the agency's attempt to define its own mandate should not be entitled to deference under the standards set forth by this Court. *See, discussion in*, Sunstein, *supra*, 90 COLUM. L. REV. at 2097-2100.[17] Finally, neither the record, nor the actions of the Director in administering the statute demonstrate a "consistent interpretation of the statute over time," as required.[18]

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[17]

> Because congressional instructions are crucial here, courts should probably refuse to defer to agency decisions with respect to issues of jurisdiction - again, if we assume that the distinction between jurisdictional and nonjurisdictional questions is easily administrable. The principal reason is that Congress would be unlikely to want agencies to have the authority to decide on the extent of their own powers.

Sunstein, *supra*, 90 COLUM. L. REV. at 2099.

[18]The most compelling evidence of this lack of consistency over time has been the Director's failure, at any time during the Act's

(continued...)

The manner of the application of the presumption against extraterritoriality by the court below has ramifications far beyond those demonstrated in the instant cases, as does the court's employment of the general principles of deference to agency interpretations. Certiorari should be granted to resolve these issues.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

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[18](...continued)
existence, to implement the authority granted by § 39(b). This section, ironically, is the very provision relied upon by the Director and the court below as evidence of Congressional intent to extend the coverage of the Act to the high seas. Although this section authorizes the Director to create compensation districts "to include the high seas," the Director has never created such a compensation district or assigned jurisdiction over injuries occurring on the high seas to an existing compensation district. *See, e.g.*, 20 C.F.R. §§ 702.101, 702.102, 702.103. In point of fact, neither of the respondents in the instant case filed their claims in the "proper" compensation district; no such district exists or has existed for the sixty-seven years of the Act's history.

Respectfully submitted,

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September 29, 1994

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 567—August Term, 1993

(Argued October 21, 1993 Decided July 6, 1994)

Docket No. 89-4114

SPYRIDON KOLLIAS,

Petitioner,

—v.—

D & G MARINE MAINTENANCE, STATE INSURANCE FUND, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 741—August Term, 1993

(Argued October 21, 1993 Decided July 6, 1994)

Docket No. 92-4109

B & A MARINE CO. and STATE INSURANCE FUND,

Petitioners,

—v.—

ELEFTHERIOS GOUVATSOS and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Before:

MESKILL, PIERCE and MAHONEY,

Circuit Judges.

Petitions for review of final orders of the Benefits Review Board, denying benefits in No. 89-4114 and granting benefits in No. 92-4109 pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950.

Petition granted and order denying benefits reversed in No. 89-4114; petition denied and order granting benefits affirmed in No. 92-4109.

JOSHUA T. GILLELAN, II, Office of the Solicitor, United States Department of Labor, Washington, D.C. (Thomas S. Williamson,

Jr., Solicitor of Labor, Carol A. De Deo, Associate Solicitor, United States Department of Labor, Washington, D.C., of counsel), *for Director, OWCP.*

RICHARD A. COOPER, New York City (Amy Levitt, Martin Krutzel, Fischer Brothers, Bernard Rolnick, New York City, Jane R. Goldberg, Philadelphia, PA, of counsel), *for D&G Marine Maintenance, State Insurance Fund* and *B&A Marine Co.*

MESKILL, *Circuit Judge*:

These petitions for review require us to determine whether the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, applies to injuries sustained on the high seas. In Docket No. 89-4114 (Kollias case), petitioner Spyridon Kollias petitions for review of a final order of the Benefits Review Board (Board) denying his claim for LHWCA benefits. The Board based its denial of benefits on the ground that Kollias' injury had occurred on the high seas, which is not a statutorily covered situs as defined in the coverage provision of the LHWCA, 33 U.S.C. § 903(a) (section 3(a)). In Docket No. 92-4109 (Gouvatsos case), petitioner B&A Marine Co. (B&A Marine) petitions for review of a final order of the Board granting LHWCA benefits to B&A Marine's employee, respondent Eleftherios Gouvatsos. The Board granted Gouvatsos' claim for benefits on the ground that Gouvatsos' injury, which had occurred on the high seas, was covered by the LHWCA because the phrase "navigable waters of the United States" in section

3(a) includes the high seas. We grant Kollias' petition and reverse the Board's denial of benefits; we deny the petition in the Gouvatsos case and affirm the Board.

BACKGROUND

Kollias Case

Kollias, an employee of respondent D&G Marine Maintenance (D&G Marine), was injured while working as a repairman on the T.T. WILLIAMSBURGH (WILLIAMSBURGH). Kollias' injury occurred during a voyage from Galveston, Texas, to Long Beach, California. At the time of the injury, the WILLIAMSBURGH was on the high seas, which have been defined as those waters beyond the territorial waters of the United States, which extend three miles from the coast. *See Moragne* v. *States Marine Lines*, 398 U.S. 375, 397-98 (1970); *United States* v. *Hilton*, 619 F.2d 127, 131 n.1 (1st Cir.), *cert. denied*, 449 U.S. 887 (1980); *Cove Tankers Corp.* v. *United Ship Repair*, 528 F.Supp. 101, 105 (S.D.N.Y. 1981) (*Cove Tankers I*), *aff'd on other grounds*, 683 F.2d 38 (2d Cir. 1982) (*Cove Tankers II*). After Kollias' injury, the WILLIAMSBURGH made an unscheduled stop in Curacao and traveled through the territorial waters of other foreign nations on an unscheduled basis.

Kollias sought compensation for his injury from D&G Marine pursuant to section 4(a) of the LHWCA, which provides that "[e]very employer shall be liable for and shall secure the payment to his employees of the compensation payable under [the LHWCA]." 33 U.S.C. § 904(a). D&G Marine's compensation insurer, State Insurance Fund (Fund), was also a party to the action.

After a hearing, an administrative law judge (ALJ) of the United States Department of Labor denied Kollias' claim on the ground that Kollias' injury had not occurred on a covered situs, which is defined in section 3(a) as "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." The parties did not dispute that Kollias met the LHWCA's status requirement, that is, that he satisfied the statutory definition of "employee." 33 U.S.C. § 902(3) (section 2(3)). Although the ALJ made no factual findings with respect to Kollias' citizenship, the WILLIAMSBURGH's country of registry, or the location of D&G Marine, the parties appear to agree that Kollias is a New York resident, D&G Marine is based in New York, and the WILLIAMSBURGH is an American flag ship. We will assume, without deciding, that these representations are accurate.

Kollias appealed to the Board, which affirmed. In its decision, the Board noted that Kollias had received state workers' compensation benefits paid voluntarily by D&G Marine and that the parties had agreed that state workers' compensation coverage would be available to Kollias if he were not covered under the LHWCA.

Kollias then filed a petition for review in this Court. This Court received full briefing and heard oral argument on May 31, 1990. The Court then remanded the case to the Board for further factual findings and retained jurisdiction. The questions put to the Board were: (1) was the WILLIAMSBURGH's stop in Curacao unscheduled, and (2) did the WILLIAMSBURGH travel or was it scheduled to travel through other foreign territorial waters. After the Board provided answers to these questions, the parties

submitted supplemental briefs relating to the new findings and presented further oral argument on October 21, 1993. The Director of the Office of Workers' Compensation Programs of the Department of Labor (Director), who is charged by the Secretary of Labor with administering the LHWCA, has participated in the Kollias case in this Court as a respondent and supports Kollias' position.

Gouvatsos Case

Gouvatsos, an employee of B&A Marine, a New York ship repair company, was injured while working as a repairman and supervisor on the AMOCO CREMONA, a ship of Bermudian registry. At the time of Gouvatsos' injury, the AMOCO CREMONA was on the high seas during a return voyage from Bagaritos, Mexico, to Galveston Roads, Texas. The record does not reveal Gouvatsos' citizenship or residence, but the Director represents that Gouvatsos is American. For purposes of this case, we assume that this representation is accurate.

Gouvatsos sought compensation for his injury from B&A Marine pursuant to the LHWCA. The Fund, B&A Marine's compensation insurer, was an additional party to the action. The parties agreed that the sole issue presented by Gouvatsos' claim was whether his injury had occurred on a statutorily covered situs for purposes of section 3(a) of the LHWCA. After receiving written submissions, an ALJ of the Department of Labor granted Gouvatsos' claim for benefits. B&A Marine and the Fund appealed to the Board, which affirmed. B&A Marine and the Fund then petitioned for review in this Court. The Director has participated in the case in this Court as a respondent and supports Gouvatsos' position.

Issues on Appeal

The Director and the claimants generally contend that the LHWCA applies to the high seas and, therefore, provides a remedy for the claimants' injuries. More specifically, they assert that the presumption against extraterritorial application of statutes does not bar the application of the LHWCA to the high seas in these cases.[1] In addition, the Director argues that its construction of the LHWCA is entitled to deference. The employers and the Fund (collectively "the employers") contend, on the other hand, that the presumption against extraterritoriality precludes the application of the LHWCA to the high seas and that the Court should not defer to the Director's interpretation of the jurisdictional scope of the statute.

DISCUSSION

I. *Presumption Against Extraterritoriality*

The claimants' and Director's contentions that the claimants are entitled to relief under the LHWCA rest on the premise that the LHWCA may be applied extraterritorially, that is, beyond the territorial jurisdiction of the United States. According to recent Supreme Court pronouncements, however, we must presume that Congress intended its enactments to apply only within the territorial jurisdiction of the United States, unless the legislation reflects a contrary intent. *See Smith* v. *United States*, 113 S.Ct. 1178, 1181 (1993); *EEOC* v. *Arabian Amer. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*). The presumption against extraterritorial application of statutes embodies

[1] The parties, with the exception of Gouvatsos, addressed the extraterritoriality issue in letter briefs filed at this Court's request after the October 21, 1993, oral argument in these cases.

several important policies. For example, it "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248. Moreover, the presumption recognizes that Congress "is primarily concerned with domestic conditions." *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949). Accordingly, "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality." *Aramco*, 499 U.S. at 248.

A. *Applicability of the Presumption*

We must begin our analysis by considering whether the presumption against extraterritoriality applies at all with respect to the LHWCA. The Director and Kollias assert a host of arguments against the applicability of the presumption in this context. None of these arguments is persuasive.

First, the Director and Kollias contend that neither of the two primary considerations underlying the presumption—avoidance of international discord and Congress' focus on domestic matters—is implicated here. *See Aramco*, 499 U.S. at 248. With respect to the potential for international discord, they assert that there is no such potential created by application of the LHWCA to the high seas because the choice of law analysis in *Lauritzen* v. *Larsen*, 345 U.S. 571, 583-90 (1953), adequately accounts for foreign interests. The Supreme Court has recently held, however, that the presumption against extraterritoriality, which embodies numerous policies, applies even if the potential for international discord is weak or nonexistent. *See Sale* v. *Haitian Centers Council*, 113 S.Ct. 2549, 2560 (1993); *Smith*, 113 S.Ct. at 1183 n.5.

With respect to the second primary consideration underlying the presumption—Congress' focus on domestic matters—the Director and Kollias assert that maritime legislation, such as the LHWCA, naturally applies extraterritorially and that Congress does not, therefore, in the maritime context, legislate against the backdrop of the presumption against extraterritoriality. They conclude that maritime legislation is not subject to the presumption. In support of this argument, they rely primarily on *United States* v. *Bowman*, 260 U.S. 94, 98 (1922), in which the Supreme Court held that a criminal statute prohibiting conspiracy to defraud a corporation in which the United States is a stockholder applied extraterritorially, despite Congress' failure to indicate that the statute should be so applied. In *Bowman*, the Court explained that, if a statute is to be applied extraterritorially, "it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." *Id.* at 98. The *Bowman* Court then noted, however, that "the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated." *Id.*

Despite the Director's and Kollias' claim that the LHWCA is "not logically dependent on [its] locality for the Government's jurisdiction," we find *Bowman* unpersuasive with respect to the LHWCA. The Supreme Court's recent discussions of the presumption against extraterritoriality, none of which mentions *Bowman*, seem to require that *all* statutes, without exception, be construed to apply within the United States only, unless a contrary intent appears. *See, e.g.*, *Smith*, 113 S.Ct. at 1183

& n.5; *Aramco*, 499 U.S. at 248. At best, therefore, the holding in *Bowman* should be read narrowly so as not to conflict with these more recent pronouncements on extraterritoriality. Reading *Bowman* as limited to its facts, only criminal statutes, and perhaps only those relating to the government's power to prosecute wrongs committed against it, are exempt from the presumption. *Bowman*, 260 U.S. at 98; *cf. United States* v. *Larsen*, 952 F.2d 1099, 1100-01 (9th Cir. 1991) (applying *Bowman* to hold that 21 U.S.C. § 841(a)(1) may be applied extraterritorially). Under that narrow reading of *Bowman*, the LHWCA is subject to the presumption against extraterritoriality.

The Director and Kollias further contend that the presumption does not apply to the LHWCA because it does not apply to the Jones Act, 46 U.S.C. § 688. The Director states that the presumption against extraterritoriality is relevant to the LHWCA only if "the extraterritorial application of the LHWCA is subject to construction under different principles than those applied to the Jones Act in *Lauritzen*." We are not persuaded.

Even assuming that the Jones Act and the LHWCA should be treated identically in this respect, it is not clear that the presumption against extraterritoriality is inapplicable to the Jones Act. The parties cite no cases holding that the Jones Act is exempt from the presumption, nor have we found any. Rather than establishing that the Jones Act is not subject to the presumption, the Director and Kollias cite *Lauritzen*, 345 U.S. at 583-90, which discusses the choice of law analysis appropriate in maritime tort cases in which the Jones Act or general maritime law is invoked. *See Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382 (1959) (although *Lauritzen* itself was a Jones Act case, its choice of law analysis also applies in cases invoking "general maritime principles of

compensation for personal injury"). The choice of law analysis in *Lauritzen* is, however, unrelated to the presumption against extraterritoriality; indeed, to hold that the LHWCA is subject to the presumption is to say nothing about whether *Lauritzen* applies in the LHWCA context. Accordingly, we reject the Director's and Kollias' contention that Jones Act cases require exemption of the LHWCA from the presumption against extraterritoriality.

Finally, Kollias asserts that the presumption against extraterritoriality does not apply in his case because application of the LHWCA would not be extraterritorial at all. He contends that, because he was injured on an American flag vessel and because the law of the flag governs the internal affairs on a vessel, *see McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963), the WILLIAMSBURGH was in effect a United States territory as it traveled across the high seas. This argument is unpersuasive. First, the law of the flag does not necessarily govern shipboard conduct; in the Jones Act context, for example, the *Lauritzen* analysis provides a guide to determining the applicable body of law. *See, e.g.*, *Hellenic Lines* v. *Rhoditis*, 398 U.S. 306, 308-09 (1970) (applying *Lauritzen* to determine that United States law governs maritime tort case in which Greek seaman with Greek employment contract is injured on Greek flag vessel while in a United States port, but employer's base of operations is in the United States). Although no case has previously held that *Lauritzen* applies in cases in which the LHWCA is invoked, we are confident that the *Lauritzen* analysis or another choice of law analysis would be used to determine the applicable body of law in such cases. *Cf. Romero*, 358 U.S. at 382 (*Lauritzen* analysis applies when general maritime law, not Jones Act, is invoked). Indeed, it would be particularly inappropriate

automatically to apply the law of the flag in LHWCA cases because, under the LHWCA, the shipowner is an irrelevant party. *Compare* 33 U.S.C. § 904(a) (employer is liable for LHWCA compensation) *with, e.g., Lauritzen*, 345 U.S. at 574 (Jones Act claim against shipowner). The premise of Kollias' argument, that United States law applies to all United States flag ships, is thus unpersuasive.

In any case, the concept of extraterritoriality does not refer to the body of law that governs the dispute; if it did, extraterritorial application of United States statutes would be an impossibility because any place where United States law governed a particular dispute would be considered United States territory. Accordingly, we decline to characterize the WILLIAMSBURGH as a kind of floating United States territory, where application of the LHWCA would not be extraterritorial.

For the above reasons, we are not persuaded that the LHWCA is exempt from the generally applicable presumption against extraterritoriality. The LHWCA may not be applied on the high seas, therefore, in the absence of a sufficiently clear indication that Congress intended extraterritorial application of the statute. We now proceed to determine whether such an indication appears.

B. *Overcoming the Presumption*

1. *Standard*

In *Aramco*, the Court stated that the presumption is not overcome unless there appears " 'the affirmative intention of the Congress clearly expressed.' " 499 U.S. at 248 (quoting *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). In determining that the presumption was not overcome with respect to Title VII, the

Aramco Court considered both the language contained in the statute and the absence of certain provisions, such as one addressing conflicts with foreign laws. *Id.* at 248-56. The *Aramco* Court also noted that the interpretation of Title VII by the Equal Employment Opportunity Commission (EEOC), one of the two agencies with primary responsibility for enforcing Title VII, was entitled only to limited deference because the EEOC is not empowered to issue rules and regulations interpreting Title VII and because the EEOC had previously expressed inconsistent views on the extraterritorial application of Title VII. *Id.* at 258 (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). The Court concluded that "even when considered in combination with petitioners' other arguments, the EEOC's interpretation is insufficiently weighty to overcome the presumption against extraterritorial application." *Id.*

The *Aramco* dissent and some commentators have interpreted the majority opinion in *Aramco* as setting forth a "clear statement" rule, such that the presumption against extraterritoriality cannot be overcome absent a clear statement in the statute itself. *See id.* at 261 (Marshall, *J.*, dissenting); *see, e.g.*, *The Supreme Court, 1990 Term—Leading Cases*, 105 Harv. L. Rev. 177, 370 (1991) (instead of "importing . . . the clear statement rule into the extraterritoriality context, . . . the [*Aramco*] Court should have consulted Title VII's legislative history and employed [a] balancing test"). If the presumption against extraterritoriality were a clear statement rule, reference to legislative history and other extrinsic indicia of congressional intent, including administrative interpretations, would be prohibited. In *Aramco* itself, however, the Court considered the EEOC's interpretation of Title VII. *Aramco*, 499 U.S. at 258. Moreover, the Supreme Court

has made clear since *Aramco* that reference to nontextual sources is permissible. For example, in *Haitian Council Centers*, the Supreme Court analyzed whether section 243(h) of the Immigration and Nationality Act of 1952 applied extraterritorially by looking to "all available evidence about the meaning of § 243(h)." 113 S.Ct. at 2562. Indeed, in considering the impact of an amendment to the statute, the court noted that "[n]ot a scintilla of evidence of such an intent [for extraterritorial application] can be found in the legislative history" and concluded that section 243(h) did not apply extraterritorially. *Id.* at 2561-62.

2. *Application*

With these guidelines in mind, we consider whether the LHWCA contains a sufficiently clear indication of congressional intent to apply the statute extraterritorially. We conclude that it does.

First, the administration section of the LHWCA, located in section 39, provides for the establishment of compensation districts that cover the high seas and, therefore, expressly contemplates coverage of injuries sustained on the high seas. 33 U.S.C. § 939(b) (section 39(b)). Section 39(b) provides:

> Judicial proceedings under sections 918 [collection of defaulted payments] and 921 [review of compensation orders] of this title in respect of *any injury or death occurring on the high seas* shall be instituted in the district court within whose territorial jurisdiction is located the office of the deputy commissioner having jurisdiction in respect of such injury or death.

Id. (emphasis added); *see also Reynolds* v. *Ingalls Shipbuilding Div.*, 788 F.2d 264, 268 (5th Cir.), *cert. denied*, 479 U.S. 885 (1986); *Cove Tankers I*, 528 F.Supp. at 108.

The emphasized language provides a strong indication that Congress intended the statute to apply extraterritorially. Indeed, section 39(b) is far stronger evidence of an extraterritorial intent than that which was ultimately found insufficient in *Aramco*.

In *Aramco*, the petitioners contended that Congress' intent that Title VII should apply extraterritorially was evident from the words "employer" and "commerce" in the statute because the definitions of those terms referred to "foreign commerce." The Court held, however, that such broad jurisdictional terms, which form boilerplate language in numerous congressional enactments, are insufficiently clear expressions of intent to overcome the presumption against extraterritoriality. *Aramco*, 499 U.S. at 251. The petitioners also cited Title VII's alien exemption provision, which specifically exempted employers with respect to their employment of aliens outside any state, as evidence of congressional intent that the statute apply extraterritorially. Because there existed, however, plausible reasons for the alien exemption clause other than an intent that the statute should have extraterritorial application, the *Aramco* Court declined to find that the presumption was overcome by virtue of that provision. *Id.* at 255.

By contrast, here, the reference to the high seas in section 39(b) is not merely broad, boilerplate language that arguably contemplates application beyond the territorial jurisdiction of the United States and that might, therefore, indicate an intent that the LHWCA apply extraterritorially. Rather, it is specific language directing the venue for a civil action relating to an injury sustained on the high seas. No plausible explanation exists for section 39(b)'s reference to the high seas other than that Congress intended LHWCA coverage for injuries sustained on the

high seas. Accordingly, the language in section 39(b) is persuasive evidence that Congress intended the LHWCA to apply extraterritorially.

Second, Congress' overriding purpose in enacting the LHWCA was to provide consistent workers' compensation coverage to eligible longshore and harbor workers, a goal that would be frustrated by limiting the LHWCA to territorial application. Congress' specific aim when it enacted the original version of the LHWCA in 1927 was "to fill the void created by the inability of the States to remedy injuries on navigable waters." *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 258 (1977); *see Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 217-18 (1917) (holding that state workers' compensation systems could not operate seaward of the water's edge). In 1972, Congress substantially amended the LHWCA to extend the statute's landward reach and thereby to ensure coverage of longshore and harbor workers who might walk between the pier and ship in the course of their work and who would, under the original version of the LHWCA, thereby have walked in and out of coverage as they crossed the "*Jensen* line." *See P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 73 (1979); *see also Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297, 316-17 & n.26 (1983) (quoting S. Rep. No. 92-1125, 92nd Cong., 2nd Sess. 13 (1972) (1972 Senate Report); H.R. Rep. No. 92-1441, 92nd Cong., 2nd Sess. 10-11 (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698, 4708 (1972 House Report)). A central purpose underlying the LHWCA was thus to create " 'a *uniform* compensation system' " in which a longshoreman's or harbor worker's coverage did not depend on the precise site of his injury. *Perini North River Assocs.*, 459 U.S. at 317 n.26 (empha-

sis added) (quoting 1972 Senate Report at 12-13; 1972 House Report at 10-11).

Although an early proposed version of section 3(a) of the 1927 LHWCA expressly provided for coverage of injuries sustained on the high seas, *see* S. Rep. No. 973, 69th Cong., 1st Sess. 2 (1926), the legislative history of section 3(a) does not fully explain the ultimate exclusion of that provision. One likely explanation, however, is that Congress intended to exclude all seamen from LHWCA coverage and that Congress understood the term "seamen" to encompass all workers employed on a vessel on the high seas. *See Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, 124 n.13 (1962). The seamen themselves apparently opposed LHWCA coverage, because they preferred the tort recovery available under the Jones Act, 46 U.S.C. § 688. *To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments: Hearing on S. 3170 Before the House Judiciary Comm.*, 69th Cong., 1st Sess. 177-78 (1926); 68 Cong. Rec. 5410, 5412 (1927). The exclusion of the explicit reference to the high seas in section 3(a) thus appears to have been an effort to exclude seamen, not to exclude extraterritorial application. Accordingly, interpreting the LHWCA to apply on the high seas is not inconsistent with the legislative history of the statute, but rather accords with Congress' intent to expand statutorily covered sites and to provide consistent, uniform coverage. *See Reynolds*, 788 F.2d at 271; *Cove Tankers II*, 683 F.2d at 42.

Finally, the Director, the policymaker designated by the Secretary of Labor to administer the LHWCA, interprets the LHWCA as overcoming the presumption and as applying extraterritorially. This interpretation apparently has been consistent over time. Although the level of def-

erence due to the Director in this context is not entirely clear, *compare Aramco*, 499 U.S. at 258 ("persuasive value [of EEOC interpretation of Title VII] is limited"), *with Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992) (reasonable interpretation of LHWCA by Director, who has rulemaking authority, is entitled to deference if the interpretation has been consistent over time), we may, at a minimum, consider the Director's interpretation in combination with indicia of congressional intent. *See Aramco*, 499 U.S. at 258.

In light of the express reference to the high seas in section 39(b) of the LHWCA, congressional intent to provide consistent coverage for longshore and harbor workers and the Director's interpretation, we conclude that the presumption against extraterritoriality is overcome in the LHWCA. Accordingly, the statute may be applied beyond the territorial jurisdiction of the United States, including on the high seas.

II. *"Navigable Waters"*

Given our conclusion that Congress intended that the LHWCA apply extraterritorially, we interpret the phrase "navigable waters of the United States" in section 3(a) as including the high seas. We thus expand on our previous holding in *Cove Tankers II*, 683 F.2d at 41, that "navigable waters of the United States" should be read to include the high seas only under certain limited circumstances.

III. *Claimants' Entitlement to Benefits*

In the cases before us, the injuries of Kollias and Gouvatsos, who both undisputedly meet the definition of "employee" contained in section 2(3), occurred on the

high seas.[2] No choice of law issue has been raised by the employers, and we thus conclude that United States law, that is, the LHWCA, is the applicable law. Because the high seas fall within the permissible jurisdictional reach of the LHWCA, the statute covers both claimants' injuries. The Board, therefore, improperly denied Kollias' claim for benefits under the LHWCA and properly granted Gouvatsos' claim.

In light of this conclusion, we need not reach Kollias' alternative contention that relitigation of the issue of the LHWCA's coverage of his injury is barred because that issue was resolved in a prior case in which he sought relief pursuant to the Jones Act, 46 U.S.C. § 688. *See Kollias* v. *Bay Tankers*, 742 F.2d 1441 (2d Cir.) (mem.), *cert. denied*, 469 U.S. 1073 (1984). Moreover, we need not determine whether the Board's findings with respect to Kollias' receipt of and eligibility for state workers' compensation benefits were clearly erroneous, as urged by the Director. Resolution of this question is irrelevant to the ultimate issue of whether Kollias is entitled to LHWCA benefits. *See Perini North River Assocs.*, 459 U.S. at 307-09 & n.19 (federal and state coverage for injured maritime workers may overlap, and federal coverage is not exclusive in overlapping areas); *Sun Ship* v. *Pennsylvania*, 447 U.S. 715, 719-21 (1980) (federal coverage and state coverage for longshore and harbor workers are not mutually exclusive); *Calbeck*, 370 U.S. at 126-27 (an injury may be covered by the LHWCA "whether or not [it] was also

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[2] Because it is undisputed before this Court that both Kollias' and Gouvatsos' injuries occurred on the high seas and that both were "employees" within the meaning of section 2(3), we need not address the Director's assertion that, contrary to the claim of D&G Marine and the Fund, the presumption prescribed in section 20(a) of the LHWCA, 33 U.S.C. § 920(a), applies to factual questions underlying issues of coverage under sections 2(3) and 3(a).

within the constitutional reach of a state work[ers'] compensation law"); 33 U.S.C. § 903(e) (providing that any liability imposed under the LHWCA shall be reduced by "any amounts paid to an employee for the same injury, disability, or death for which [LHWCA] benefits are claimed").

CONCLUSION

In the Kollias case, we grant the petition, reverse the Board's denial of benefits and remand for further proceedings consistent with this opinion. In the Gouvatsos case, we deny the petition and affirm the Board's grant of benefits.

APPENDIX B

Order of Benefits Review Board, Transmitting the Administrative Law Judge's Decision and Order of January 22, 1993, in the case of Spyridon Kollias, Dated April 22, 1993

U.S. Department of Labor

Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 85-2881

SPYRIDON KOLLIAS Claimant-Petitioner v. D & G MARINE MAINTENANCE and STATE INSURANCE FUND Employer/Carrier-Respondent	Date issued APR 22 1993 ORDER

By Order of June 26, 1990, the United States Court of Appeals for the Second Circuit remanded this case to the Board for further factfinding on two specific issues. The court retained jurisdiction of the petition for review pending the Board's factfinding. *Kollias v. D & G Marine Maintenance*, No. 89-4114 (June 26, 1990).

Not being empowered to make findings of fact, the Board thereafter remanded the case to the Office of Administrative Law Judges for resolution of the questions presented by the court.

On January 22, 1993, the administrative law judge issued the attached Decision and Order, finding as follows:

1) the trip to Curacao was not a scheduled stop, but was made after the voyage began and orders were received from Petrofina to pick up "spot cargo;" and

2) the *Williamsburgh* traveled through the territorial waters of foreign nations other than Curacao on an unscheduled basis.

As the administrative law judge has made the factual findings directed by the court, no further action by the Board is required. Accordingly, as the court retained jurisdiction of this case, the administrative law judge's Decision and Order of January 22, 1993 is hereby transmitted to the United States Court of Appeals for the Second Circuit in order that the court may resume its consideration of this case.

/s/ RPS
ROY P. SMITH
Administrative Appeals Judge

/s/Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/s/Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

APPENDIX C

Decision and Order of Administrative Law Judge, Directing Supplemental Findings be Forwarded to the United States Court of Appeals for the Second Circuit, in the case of Spyridon Kollias, Dated January 22, 1993

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street N.W.
Washington, D.C. 20001-8002

In the Matter of	
SPYRIDON KOLLIAS	
Claimant	
v.	
D & G MARINE MAINTENANCE	Case No. 85-LHC-45
Employer	OWCP No. 2-81213
and	
THE STATE INSURANCE FUND	
Carrier	

DECISION AND ORDER ON REMAND

This case was remanded to the Benefits Review Board (hereinafter (BRB), by the United States Court of Appeals for the Second Circuit for resolution of two factual questions. Not being empowered to make findings of fact, the BRB on July 31,

1989 remanded this case to the Office of the Administrative Law Judges for further proceedings.

The Court stated in its order that it would retain jurisdiction of the case, and that after our action was completed it should be returned to the same panel (Justices Meskill, Pierce, and Mahoney) which issued the remand order.

The Court has ordered that findings of fact be made on the following issues:

(1) Whether the *Williamsburgh's* stop at Curacao was a scheduled stop;

(2) Whether the *Williamsburgh* traveled or was scheduled to travel through the territorial waters of foreign nations other than Curacao.

In lieu of a supplemental hearing, the respondent submitted the deposition of an expert witness (Captain Douglas A. Hard) and additional documentary evidence as follows:

Ex. E1	Curriculum Vitae of Captain Douglas A. Hard.
Ex. E2	A narrative report of the voyage of T.T. Williamsburgh prepared by Captain Hard.
Ex. E3	Nine charts showing the voyage of the Williamsburgh and marked by Captain Hard showing the route of the vessel.
Ex. E4	Ships articles signed in Long Beach, California in June 1980.
Ex. E5	Bridge Logs, of T.T. Williamsburgh covering the period from July 1, 1980 through September 30, 1980.

Ex. E6 Official log, T.T. Williamsburgh.

Ex. E7 The April 23, 1980 Order of the Maritime Administration, regarding the application of American Petrofina for permission to allow the T.T. Williamsburgh to carry oil from Valdez, Alaska to the "U.S. Gulf," and return by way of the southern tip of South America.

By letter dated June 24, 1992 the Claimant introduced additional evidence stating that the Employer had copies of these documents, and which I have entered into the record as follows:

Ex. C1 Cover letter dated June 24, 1992.

Ex. C2 Crew's Custom Declaration dated August 3, 1980 at Curacao.

Ex. C3 Letter dated September 13, 1983 from MARAD reporting information to Claimant pursuant to Freedom of Information Act.

Ex. C4 Telex dated March 6, 1981 reciting dates and events of voyage of the T.T. Williamsburgh in the Alaskan trade pursuant to the 506 waiver.

Ex. C5 Order of MARAD allowing the Williamsburgh to carry oil in the domestic trade from Valdez, Alaska to the "U.S. Gulf" by going around the southern tip of South America rather than through the Panama Canal.

The testimony of Captain Hard is that the term "scheduled" is a misnomer when used in relationship to the voyage of the Williamsburgh and that the ship's articles establish that this was a tramp tanker voyage which by its very nature would anticipate any number of unscheduled deviations in hope of gaining additional cargoes.

It was also contended by the Employer that the testimony of Captain Hard, and documentary evidence including the logs and charts, demonstrate that the Williamsburgh did travel through territorial waters of a number of foreign countries including Cuba, Tobago and Chile.

The Claimant contends that by virtue of new articles opened in Curacao or Galveston and an application filed by American Petrofina for permission to deviate to Curacao, this voyage was unique in that it was designed to test whether it would be economically practicable for a ship to pick up its cargo of oil in Valdez, Alaska, go round Cape Horn at the tip of South America and go back up to a port in Houston or Galveston, and return, when compared with the usual domestic routes, which were from Valdez to the Panama Canal to Galveston and return.

Captain Hard was an effective expert witness for this case particularly since he had the experience of sailing a ship similar to the Williamsburgh, called the Bay Ridge. He also is a professor teaching at the Merchant Marine Academy in Kingsport, New York. His examination of many documents, particularly those dated from July 15, 1980 through September 20, 1980 described the nature of the voyage from Galveston, Texas to its arrival at Long Beach, California. He also explained the MARAD Decision dated April 23, 1980. He described the Williamsburgh as a ship which was constructed by subsidy of the United States to engage in foreign trade, but not to compete for domestic coastwise voyages. Shipping articles were signed on June 5, 1980 at Long Beach between the Master of the Williamsburgh and the seamen or the mariners of the vessel. (Dep. May 27, 1992, page 9). The voyage was described as a tramp tanker voyage to one or more ports practically anywhere in the world. During the tramp tanker's voyage, there was generally a beginning destination and a pre-set final destination, but in between it was the purpose of the vessel to pursue cargo not at previously scheduled ports, but as their availability became known to the owner or the charterers of the vessel. He described it by "analogy" as the difference between a taxi and a bus. A liner was like a bus which has a pre-set schedule and generally leaves at a

particular time and arrives at various locations and its final destination at pre-set times. A tramp tanker, on the other hand, in between looks for various cargo to be transferred from one place to another along the way. As a matter of fact interruptions could be considerable and directions changed to deviate from the original route widely. Foreign articles, on the other hand, are contracts between the Master and the crew and *inter alia* informs them that the voyage planned is between the United States and generally most any place in the world. (Dep. page 12). A voyage, on the other hand, around Cape Horn would require foreign articles, rather than coastwise or domestic articles, because the ship would be going through foreign and international waters. Ex.E3 consist of several charts, describing this voyage as leaving Galveston south and southeast on July 28, 1980 (Dep. page 14) and a log entry indicates that on August 2, 1980 at 1:30 a.m., orders were received from Petrofina to proceed to Curacao to load 100,000 tons of crude. The ship changed course and headed for Curacao on August 3, 1980. On August 6 this ship departed from Curacao and resumed its trip to Los Angeles via the Cape Horn route pursuant to the charterer's instructions. (Dep. pages 15 and 16). It was in this connection, that Captain Hard described the voyage as including trips on international waters as well as in the territorial waters of foreign countries. He described the voyage as a "routine" tramp tanker voyage, and that on August 19, 1980 the vessel entered the harbor of Rio de Janeiro, Brazil for repairs but at one point was more than 1,000 miles off the coast of Peru, thus demonstrating that the vessel went through waters of foreign countries and international waters.

The contention of the Claimant is that this voyage was unique and he claimed that new shipping articles were opened in Curacao, but he was not able to present these papers at any time up to this decision. The position of the Employer was that the articles which were signed at Long Beach in June was still valid when the vessel entered Curacao, and that such additional articles were not actually prepared. (Dep. page 24). He also contends that this was a routine tramp tanker's voyage, and that a "riding crew" was taken aboard for the purpose of making

repairs resulting from bad weather damage, while going around the Horn from west to east after the preceding voyage.

It should be noted, that at no time was it proved that new articles were made to authorize the ship to proceed to Curacao. This was because the last Shipping Articles allowed the ship to go anywhere in the world. The application of American Petrofina concerning the route from Valdez, Alaska to the U.S. Gulf via the southern tip of South America, on which the Claimant relies, shows particular circumstances which allowed the adoption of a foreign charter application only because of unique circumstances such as commercial litigation between the Bareboat charterer, and the time charterer, precluded the Bareboat charterer from making an application, and the order of MARAD finding this experimental trip justified for waiver under Section 506 of the Merchant Marine Act, 1936, as amended.

The Claimant contends that the ship went to Curacao, did not have foreign articles, would have been in violation except for the fact that they opened foreign articles in Curacao. He contends that foreign articles issued in Los Angeles originally terminated upon entry into the Gulf of Mexico.

The Employer in his letter of July 8, 1992 urges that the Claimant's statement of facts is contrary to the evidence and illogical. Information in the Petrofina letter of March 6, 1991, indicates that the vessel proceeded directly from Valdez to Galveston. The official log book (Emp. Exh. 6) demonstrates that the vessel stopped in Long Beach, until June 5, 1980, and this is where the vessel took on a crew that proceeded around Cape Horn where the foreign articles were clearly opened. The vessel also stopped at Rio de Janeiro on August 20, 1980. (Emp. Exh. 2-2, and 5). A discussion of the significance of the various articles which were signed during the course of this trip showed that foreign articles were necessary for the vessel to lawfully proceed around Cape Horn, and therefore new foreign articles would not have had to been opened in Galveston nor Curacao. The letter of July 8, 1992 indicates why the Claimant's version

of events was neither true nor logical and contrary to what is alleged by the Claimant, the articles of June 5, 1980 (Emp. Exh. 6 at page 20) and (Emp. Exh. 4) were plainly foreign articles and as testified by Captain Hard, would have allowed the vessel to travel to foreign ports. Both parties agree that the stop at Curacao was not a "scheduled" stop. The Claimant, however, considers it a "deviation" based on his perception that what was contemplated were two round trips, which were uninterrupted, from Valdez, Alaska to the U.S. portion of the Gulf by way of Cape Horn. The Employer contends that the trip to Curacao to obtain "spot cargo" was routine and in the nature of a Tramp Tanker's usual voyage, and that the expression "scheduled" is a misnomer, as such "deviations" were to be anticipated. In the absence of evidence that the word "scheduled" has a special meaning in maritime cases, I find that the common usage and definition of this word is "to designate a fixed time" and accordingly, I find:

1. That the trip to Curacao as described in this record, was not a scheduled stop, but was made after the voyage began and orders were given to pick up "spot cargo" upon instructions received from Petrofina, and

2. That the *Williamsburgh* also traveled through the territorial waters of foreign nations other than Curacao on an unscheduled basis. There is no evidence to indicate that it was to achieve a certain distance or reach specific locations at a specific time, except those which would be pursuant to individual instructions to redirect the course of the ship to pick up specific cargoes. Accordingly, the trips were not "scheduled" at the outset of the voyage, except for the first day of the first voyage and the last day of the second voyage. The telex message ostensibly to a law firm stated that instructions were received after the first voyage to proceed at full, safe speed to Cape Horn and await further orders. Thus, although the vessel is said to have left on May 29, 1980, it received instructions to discharge its cargo, and ordered to head for the Horn. These instructions were said to have been given on July 16, 1980. (Emp. Exh. C4). However, the exhibit does not indicate that the ship was originally contemplated to

go to Curacao, or that the voyage was to begin and end on specific dates.

According to the testimony of Captain Hard, which I credit, the ship did go through foreign and international waters on an unscheduled basis. However, the expectation was that such instructions would be issued during the course of the voyage to change direction as needed in order to pick up "spot cargo." We note that the MARAD decision permitting the vessel to enter the Alaskan oil trade instructed the owner of the vessel to inform by telegram:

1.) The date and time of commencement of initial loading of the Williamsburgh and Valdez; and

2.) The date and time of the completion of discharge of the Williamsburgh of the offloading area in the Gulf of Mexico in its second voyage. (Emp. Exh. C5, last page).

Thus, the owner of the vessel was able to designate (within certain parameters) the time for commencement of the first voyage and the ending date of the second voyage without regard to the dates of the intermediate stops which were unscheduled. MARAD was interested only in the beginning and ending dates of this experimental test not in when or where the stops were to be made in between. Accordingly, the vessel for the most part was traveling on an unscheduled basis.

ORDER

It is hereby ordered that these supplemental findings be forwarded to the United States Court of Appeals for the Second Circuit so that the claimant's appeal may be decided on the augmented record.

/s/Leonard N. Lawrence

LEONARD N. LAWRENCE
Administrative Law Judge

JAN 22 1993

APPENDIX D

Decision and Order of the Benefits Review Board, Affirming the Administrative Law Judge's Decisions and Orders, in the case of Eleftherios Gouvatsos, Dated May 14, 1992

U.S. Department of Labor

Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 84-2554

ELEFTHERIOS GOUVATSOS	)	
	)	
Claimant-Respondent	)	PUBLISHED
	)	
v.	)	DATE ISSUED:
	)	MAY 14 1992
B & A MARINE COMPANY	)	
	)	
and	)	
	)	DECISION
STATE INSURANCE FUND	)	and ORDER
	)	
Employer/Carrier-Petitioners	)	

Appeal of the Decisions and Orders of Anastasia T. Dunau, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Pomerantz (Law Offices of Irving B. Bushlow), Brooklyn, New York, for claimant.

Raymond C. Green (State Insurance Fund), New York, New York, for employer/carrier.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(Supp. V 1987).

PER CURIAM:

Employer appeals the Decisions and Orders (81-LHCA-136) of Administrative Law Judge Anastasia T. Dunau awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a ship repairman, traveled from New York to Texas City, Texas. There, he boarded the *Amoco Cremona* to perform repairs involving pipes on the main deck. The *Amoco Cremona* left Texas City on December 15, 1979 for Bagaritos, Mexico, and subsequently left Bagaritos for Galveston Roads, Texas, on December 30. Claimant injured his right knee and leg on January 1, 1980, on the part of the trip between Bagaritos, Mexico, and Galveston Roads, Texas. At the time of claimant's injury, the *Amoco Cremona* was in the Gulf of Mexico, more than 200 miles from shore.

The parties agreed at the administrative law judge level of the proceedings that the only issue in the case was whether claimant's accident occurred on a situs covered under the Act. They agreed to submit this issue on briefs, without holding a hearing. In addition, they stipulated to the location of the *Amoco Cremona* at the time of the accident, agreeing that it was more than 200 miles off the nearest coast of the United States and that it was, therefore, on the high seas.

In her first Decision and Order, dated July 7, 1982, the administrative law judge found that claimant satisfied the situs test for coverage under the Act, and that since status was not at issue, claimant was entitled to benefits. The administrative law judge left the record open for the parties to submit evidence pertaining to the amount of compensation to which claimant was entitled. The administrative law judge issued a second

Decision and Order, dated October 9, 1984, in which she, *inter alia*, reiterated her finding that claimant satisfied the situs requirement of the Act, and awarded compensation.[1]

On appeal, employer disputes only the administrative law judge's jurisdictional finding, arguing that claimant failed the situs test. Employer argues that Section 3(a) of the Act, 33 U.S.C. §903(a), defines a covered situs as "navigable waters of the United States," which extend only three miles from the coastline. Employer contends that any location beyond that three-mile limit constitutes the "high seas" and is not a covered situs. Because claimant was injured some 200 miles from the coast, employer argues, claimant failed the situs test. Claimant responds, urging that employer's challenge be rejected.

Compensation under the Act is limited to injuries occurring upon the navigable waters of the United States, as defined in Section 3(a). *See* 33 U.S.C. §903(a).[2] *See also Kollias v. D & G Marine Maintenance*, 22 BRBS 367 (1989).[3] In finding that claimant established situs under the Act, the administrative law

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[1] Employer appealed the administrative law judge's jurisdictional findings in her first Decision and Order, and this appeal was dismissed by the Board as premature, by order dated August 23, 1982.

[2] Section 3(a) of the Act states:

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel) . . . .

33 U.S.C. §903(a)(1982)(amended 1984).

[3] *Kollias* was appealed to the United States Court of Appeals for the Second Circuit, which in an unpublished summary order remanded the case to the Board for resolution of two issues concerning the itinerary of the vessel involved in the case. No. 89-4114 (2d Cir., June 26, 1990).

judge in this case relied on *Cove Tankers Corp. v. United Ship Repair, Inc.*, 528 F. Supp. 101 (S.D.N.Y. 1981). In *Cove Tankers*, two boiler repairmen were working on a ship 135 miles off the United States coast when a boiler exploded, killing one of the repairmen and injuring the other. The ship was en route from Philadelphia to New York, but the accident occurred when the ship deviated 135 miles offshore. 528 F. Supp. at 103. The district court examined the language of the "coverage," "administration," and "definitions" sections of the Act, as well as pertinent legislative history, and concluded that the navigable waters of the United States, within the meaning of the Act, included the high seas. *See* 528 F. Supp. at 109. The court addressed relevant case law, and held that in the "definitions" provision of Section 2(9) of the Act, 33 U.S.C. §902(9), "[t]he words 'United States' in the phrase 'navigable waters of the United States' . . . designate the waters as to which the United States rather than individual states have jurisdiction." 528 F. Supp. at 109. The court thus rejected the plaintiff's argument that Section 2(3) operates to limit coverage under the Act to United States territorial waters, *i.e.* waters up to three miles offshore.[4] The court at the same time noted that the " 'navigable waters of the United States' for the purposes of the [Act] do not extend into the waters belonging to jurisdictions which under the Act's 'Definitions' section are jurisdictions which are not a part of the United States." *Id.* at 109.

Subsequent to the issuance of the administrative law judge's first Decision and Order in this case, in which she relied on the district court's *Cove Tankers* decision, the United States Court of Appeals for the Second Circuit issued its disposition of the appeal in that case, affirming the district court's finding of coverage, but on narrower grounds. *See Cove Tankers Corp. v. United Ship Repair, Inc.*, 683 F.2d 38, 14 BRBS 916 (2d Cir. 1982). The Second Circuit held that under the particular facts of the case, the claimant's injury occurred within the coverage of the Act. 683 F.2d at 41, 14 BRBS at 921. The court reasoned

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[4] Territorial waters of the United States extend approximately three miles seaward from the coast, while waters beyond this limit are considered the high seas. *See Cove Tankers, supra*, 528 F.Supp. at 105.

that the claimant was on a United States vessel, going to and from United States ports, with no deviation scheduled (or otherwise) into foreign territorial waters, and that the injured employees did not have coverage pursuant to another scheme of workers' compensation (because they were beyond the outer limit of state coverage). The court stressed its intention to discourage shipowners from deviating onto the high seas to avoid the coverage of the Act. *See* 683 F.2d at 42, 14 BRBS at 922. The Board has addressed these criteria in subsequent cases, holding a claimant injured on the high seas 14 miles offshore was covered while an injury to a diver on a land-locked reservoir was not. *See Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986); *Williams v. Pan Marine Construction*, 18 BRBS 98 (1986), *aff'd*, 825 F.2d 246, 20 BRBS 25 (CRT) (9th Cir. 1987).[5]

Moreover, in *Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264, 19 BRBS 10 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 885, 107 S.Ct. 278 (1986), the United States Court of Appeals for the Fifth Circuit held that an injury to a covered employee occurring on the high seas occurs on a covered situs. In so doing, the *Reynolds* court cited the Court of Appeals decision in *Cove Tankers, supra*, with approval. *See* 788 F.2d at 270-71, 19 BRBS at 15 (CRT). The Fifth Circuit agreed with the district court's *Cove Tankers* determination that the phrase "navigable waters of the United States" in Section 2(3) historically has been used in contradistinction to navigable "state" waters, and not in contrast to the high seas. *See* 788 F.2d at 270, 19 BRBS at 15 (CRT). The *Reynolds* court reasoned that had Congress so intended, it could have chosen to use the term "territorial waters" instead of "navigable waters of the United States" in delineating the extent of the Act's coverage. The court, in finding coverage, also emphasized congressional concern over moving employees in and out of coverage. *Id.*

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[5] Employer cites a line of cases in its appeal brief, which was submitted in connection with its first appeal, in support of its position that claimant's injury did not occur on a covered situs. The first appeal in this case, which was dismissed as premature, was filed with the Board on June 14, 1982. We note that much of the law on this issue contrary to employer's position in this case evolved subsequent to the first appeal.

In the instant case, we reject employer's argument that waters beyond the three-mile territorial limit cannot constitute navigable waters of the United States for purposes of situs. Applying the specific factors which the *Cove Tankers* court found significant, we hold that claimant is covered by the Act. Although the vessel in *Cove Tankers* was a United States flag vessel, while the administrative law judge in the instant case found that the *Amoco Cremona* was of Bermudian registry, employer's address is in New York and claimant is a United States resident. With respect to the ship's itinerary, the Second Circuit found significant that the ship was traveling between two United States ports, with no deviation scheduled or otherwise into the territorial waters of any foreign nation. In the instant case, claimant's ship did make a scheduled deviation into a foreign port, but claimant boarded the ship in a Texas port and was on his way to another Texas port when the injury occurred. In *Cove Tankers*, the court expressed its concern that since the injury in that case occurred 135 miles offshore, it was well beyond state waters, and, therefore, beyond the outer limits of state coverage. *See* 683 F.2d at 41, 14 BRBS at 921-922. In the instant case, although the administrative law judge noted that claimant had received $27,464 under New York state compensation laws, it is not clear under what circumstances he obtained this sum. Because the Second Circuit in *Cove Tankers* did not provide guidance as to how to characterize situations other than the one before it, we cannot, as a matter of law, hold that the finding of the administrative law judge in this case that claimant satisfied the situs test was irrational or not in accordance with the applicable law. *See Cove Tankers, supra*. Moreover, under the precedent established by the Fifth Circuit in *Reynolds*, which addressed the *Cove Tankers* decision, claimant clearly is covered under the Act. We therefore affirm the determination of the administrative law judge that claimant meets the situs requirement of Section 3(a) of the Act.

Accordingly, the Decisions and Orders of the administrative law judge awarding benefits are affirmed.

SO ORDERED.

/s/Betty J. Stage

BETTY J. STAGE, Chief
Administrative Appeals Judge

/s/Nancy S Dolder

NANCY S. DOLDER
Administrative Appeals Judge

/s/Leonard N Lawrence

LEONARD N. LAWRENCE
Administrative Law Judge

APPENDIX E

Order of Benefits Review Board, Remanding the Case to the Administrative Law Judge's Office for Further Proceedings Consistent with the Decision of the United States Court of Appeals for the Second Circuit, in the case of Spyridon Kollias, Dated February 4, 1991

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 85-2881

SPYRIDON KOLLIAS Claimant-Petitioner v. D & G MARINE MAINTENANCE and STATE INSURANCE FUND Employer/Carrier-Respondents	**FILED AS PART OF THE RECORD** FEB 4 1991 (date) /s/ Linda M. Meekins Clerk of the Board Benefit Review Board /s/JKT ORDER

In a Decision and Order dated July 31, 1989, the Board affirmed the administrative law judge's finding that claimant was not injured on a situs covered by the Act. *See Kollias v. D & G Marine Maintenance*, 22 BRBS 367 (1989); 33 U.S.C. §903(a). Claimant sustained a head injury on July 30, 1980, during the course of his employment on board the *T.T. Williamsburgh*. The ship had embarked from Galveston, Texas on a voyage around Cape Horn to Long Beach, California. The ship entered the territorial waters of Curacao on August 4, 1980 to load spot cargo.

The Board held that the administrative law judge rationally concluded that claimant's injury occurred on the high seas and was not within the scope of the opinion of the United States Court of Appeals for the Second Circuit in *Cove Tankers v. United Ship Repair*, 683 F.2d 38, 14 BRBS 916 (2d Cir. 1982), that under certain circumstances, an injury occurring on the high seas is covered under the Act.

Thereafter, claimant appealed the Board's decision to the United States Court of Appeals for the Second Circuit. 33 U.S.C. §921(c). The court stated that the present record was insufficient for the resolution of the following two issues: (1) whether the *Williamsburgh*'s stop at Curacao was a scheduled stop; and (2) whether the *Williamsburgh* traveled or was scheduled to travel through the territorial waters of foreign nations other than Curacao. Accordingly, the court remanded the case to the Board for fact-finding on these two issues. The court also stated that the panel would retain jurisdiction of the petition for review pending the Board's factfinding. *Kollias v. D & G Marine Maintenance*, No. 89-4114 (2d Cir. June 28, 1990).

The Board is not empowered to engage in a *de novo* review of the record or to engage in factfinding in the first instance. *See generally Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). As the record is devoid of evidence concerning the issues raised by the Court of Appeals, we must remand the case to the administrative law judge to reopen the record, to receive evidence concerning these issues, and to issue a Decision and Order making the necessary findings of fact. *See* 33 U.S.C. §921(b)(4). We note that the Board was served with a copy of a letter dated October 8, 1990 from claimant's attorney to employer's attorney with attachments that pertain to the issues raised by the court. On remand, the administrative law judge should determine if these documents are relevant and admit them into the reopened record if they are.

Accordingly, the case is remanded to the Office of Administrative Law Judges for further proceedings consistent with the decision of the United States Court of Appeals for the Second Circuit.

/s/ R P S

ROY P. SMITH
Administrative Appeals Judge

/s/ Nancy S Dolder

NANCY S. DOLDER
Administrative Appeals Judge

/s/ Regina C. McGranery

REGINA C. McGRANERY
Administrative Appeals Judge

Dated this 4th day
of February 1991

APPENDIX F

Order of the United States Court of Appeals for the Second Circuit, Remanding the Case to the Benefits Review Board for Fact-finding, in the case of Spyridon Kollias, Dated June 26, 1990

(TJM) UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of June, one thousand nine hundred and ninety.

Present:

HONORABLE THOMAS J. MESKILL,

HONORABLE LAWRENCE W. PIERCE,

HONORABLE J. DANIEL MAHONEY,

Circuit Judges.

- - - - - - - - - - - - - - - -

SPYRIDON KOLLIAS,

Petitioner,

v.

D&G MARINE MAINTENANCE, STATE INSURANCE FUND, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Docket No. 89-4114

Respondents.

- - - - - - - - - - - - - - - -

This is a petition pursuant to 33 U.S.C. § 921(c) for review of an order of the Benefits Review Board of the United States

Department of Labor (Board). The Board denied petitioner benefits under the Longshore and Harbor Workers' Compensation Act (Act), 33 U.S.C. §§ 901-950, on the ground that petitioner's injury did not occur "upon the navigable waters of the United States" as required by section 3(a) of the Act, 33 U.S.C. § 903(a).

This cause came on to be heard on the transcript of record from said Benefits Review Board and was argued by counsel.

The petition for review is REMANDED to the Board for further factfinding.

The present record is not sufficient for resolution of two issues. First, whether the WILLIAMSBURGH's stop at Curacao was a scheduled stop. Second, whether the WILLIAMSBURGH travelled or was scheduled to travel through the territorial waters of foreign nations other than Curacao. Accordingly, we remand for factfinding on these two issues. This panel retains jurisdiction of the petition for review pending the Board's factfinding.

/s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

/s/ Lawrence Pierce
Lawrence W. Pierce, U.S.C.J.

/s/ J. Daniel Mahoney
J. Daniel Mahoney, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX G

Decision and Order of Benefits Review Board, Affirming the Administrative Law Judge's Decision and Order, in the case of Spyridon Kollias, Dated July 31, 1989

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 85-2881

SPYRIDON KOLLIAS Claimant-Petitioner v. D & G MARINE MAINTENANCE and STATE INSURANCE FUND Employer/Carrier-Respondents	PUBLISHED FILED AS PART OF THE RECORD JUL 31 1989 (Date) /s/Linda M. Meekins Clerk of the Board Benefit Review Board DECISION and ORDER

Appeal of the Decision and Order of Leonard N. Lawrence, Administrative Law Judge, United States Department of Labor.

Daniel M. Morrin and Helen A. Passalacqua (Pasternack & Popish, P.C.), Brooklyn, New York, for claimant.

Richard A. Cooper and Amy Levitt (Fischer Brothers), New York, New York, for employer/carrier.

Before: SMITH, Acting Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (85-LHC-45) of Administrative Law Judge Leonard N. Lawrence denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a head injury during the course of his employment for employer on July 30, 1980. Claimant was injured on board the *T.T. Williamsburgh*, which had embarked from Galveston, Texas, on a sixty-three day voyage around Cape Horn to Long Beach, California. Claimant and five co-workers were engaged to repair the starboard anchor windlass during the voyage. At the time of claimant's injury, the *T.T. Williamsburgh* was in the Yucatan Channel, which is located between Cuba and the Yucatan Peninsula of Mexico, and approximately 1500 miles from the United States mainland.

Employer voluntarily provided medical benefits and compensation for temporary total disability from July 30, 1980 to June 29, 1984, pursuant to the workers' compensation law of New York state. Claimant sought damages in the United States District Court for the Southern District of New York from employer and the shipowners of the *T.T. Williamsburgh* pursuant to the Jones Act, 46 U.S.C. §688. A jury returned a special verdict that claimant was not entitled to damages under the Jones Act because he was a maritime repairmen rather than a seaman and that the shipowners were not negligent. Claimant appealed the judgment to the United States Court of Appeals for the Second Circuit, which affirmed without opinion. *Kollias v. Bay Tankers, Inc.*, 742 F.2d 1441 (2d Cir. 1984), *cert. denied*, 469 U.S. 1073 (1984).

Claimant next sought compensation benefits under the Act. The sole issue at the formal hearing was situs. *See* 33 U.S.C. §903(a). The parties stipulated that if the claim was found to

be within the coverage of the Act, claimant was entitled to benefits for temporary total disability, *see* 33 U.S.C. §908(b), during the time employer had voluntarily paid such benefits pursuant to New York law, and the parties stated that compensation for any permanent disability claimant sustained, *see* 33 U.S.C. §908(a), (c)(21), could be resolved at the deputy commissioner level.

The administrative law judge found that the situs requirement of Section 3(a), 33 U.S.C. §903(a), was not satisfied. He initially determined that employer was not collaterally estopped from litigating the situs issue by virtue of the federal court decisions. He further distinguished the instant case from *Cove Tankers Corp. v. United Ship Repair, Inc.*, 683 F.2d 38, 14 BRBS 916 (2d Cir. 1982), which involved an injury on a ship 135 miles offshore enroute from Philadelphia to New York, after the ship had been diverted from its regular course. The administrative law judge found that, unlike *Cove Tankers*, claimant's injury occurred during a planned voyage on the high seas through foreign territorial waters, and employer agreed to pay compensation under a state workers' compensation scheme. On appeal, claimant argues that the administrative law judge erred in addressing the situs issue, as claimant contends the United States Court of Appeals for the Second Circuit found coverage under the Act in affirming the district court's decision that claimant did not have a remedy under the Jones Act. Claimant also argues that the Act and *Cove Tankers* mandate a finding of coverage. Employer responds, urging affirmance.

Claimant first alleges that the United States Court of Appeals for the Second Circuit determined that there was coverage under the Act when the court rejected claimant's appeal from the district court's judgment that his suit did not fall within the Jones Act. Claimant contends employer was therefore collaterally estopped from contesting coverage before the administrative law judge. The administrative law judge rejected claimant's argument. He noted that employer was not a party to the district court suit, as claimant moved during the trial that employer be dismissed from that proceeding. The administrative law judge

also relied on the fact that situs was not at issue and was therefore never actually litigated during the course of claimant's district court suit.

Collateral estoppel may be applicable when a prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the prior action. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5, 99 S.Ct. 645, 649 n.5 (1979). Claimant's Jones Act suit necessarily raised the issue of his employment status as either a seaman or member of a crew within the coverage of the Jones Act, or as a ship repairman potentially covered under the Longshore Act. *See* 33 U.S.C §902(3). Coverage under the Act, however, requires a finding of both status as a covered employee and situs. *See also* 33 U.S.C. §903(a). Situs was never litigated at the district court trial, nor was a finding of situs necessary to the district court's judgment and its affirmance by the United States Court of Appeals for the Second Circuit. Accordingly, employer was not collaterally estopped from contesting coverage before the administrative law judge. *Parklane Hosiery, supra*. Claimant's argument is therefore rejected.

Claimant next argues that by finding that his injury did not occur on a covered situs the administrative law judge misinterpreted the Act and the decision of the United States Court of Appeals for the Second Circuit in *Cove Tankers v. United Ship Repair, Inc.*, 683 F.2d 38, 14 BRBS 916 (2d Cir. 1982). Situs under the Act is limited to injuries occurring upon the navigable waters of the United States, as defined in Section 3(a).[1] The "United States" is defined in the Act as including the

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[1] Section 3(a) of the Act states,

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel) . . . .

33 U.S.C. §903(a)(1982).

territorial waters thereof. 33 U.S.C. §902(9). Claimant's injury 1500 miles from the United States mainland was on the high seas. The administrative law judge held that the territorial waters of the United States as defined in Section 2(9) do not include the high seas. The administrative law judge noted the decision of the United States Court of Appeals for the Second Circuit in *Cove Tankers* that the navigable waters of the United States could include the high seas where the vessel upon which the injury occurs is traveling between United States ports with no deviation into the territorial waters of any foreign nation. The administrative law judge found that, unlike *Cove Tankers*, claimant's injury in this case occurred during a voyage which entailed passage through foreign territorial waters, and the loading and unloading of cargo at a foreign part. The administrative law judge also noted that in *Cove Tankers* the court relied on the fact the claimant did not have recourse to any alternative workers' compensation system. The administrative law judge found that in the instant case the parties agree that claimant would receive benefits under the New York workers' compensation statute, if the administrative law judge denied coverage under the Act. Finding the facts of *Cove Tankers* thus distinguishable from those in the instant case, the administrative law judge found that claimant's injury did not occur on a covered situs.

In *Cove Tankers* the claimant was injured on board a ship located 135 miles from the United States mainland enroute from Philadelphia to New York. The ship had been diverted from the territorial waters of the United States to the high seas. The United States Court of Appeals for the Second Circuit affirmed, on narrower grounds, a district court's finding of coverage. The district court had determined that an injury on the high seas would fall within the situs requirement under the Act. *See Cove Tankers*, 528 F. Supp. 101 (S.D.N.Y. 1981). On appeal, the Second Circuit court held that under the particular facts of the case, the claimant's injury occurred within the coverage of the Act. *Cove Tankers*, 683 F.2d at 41, 14 BRBS at 921. The court reasoned that the claimant was on a United States vessel, going to and from United States ports, with no deviation scheduled or otherwise into foreign territorial waters, and that the claimant did

not have coverage pursuant to another scheme of workers' compensation. The court stated its intention to discourage employers from deviating onto the high seas to avoid the coverage of the Act. *Cove Tankers*, 683 F.2d at 42, 14 BRBS at 922. The Board has applied these criteria in cases involving injuries occurring on the high seas and on a land-locked reservior. *See Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986); *Williams v. Pan Marine Construction*, 18 BRBS 98 (1986), *aff'd sub nom. Williams v. Director, OWCP*, 825 F.2d 246, 20 BRBS 25 (CRT) (9th Cir. 1987). *Cf. Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264, 19 BRBS 10 (CRT) (5th Cir.), *cert. denied*, U.S. , 107 S.Ct. 278 (1986) (implying that any injury to a covered employee occurring on the high seas occurs on a covered situs).

In the instant case, the administrative law judge found that claimant was injured on the high seas about 1500 miles from the American mainland. His sixty-three day voyage around Cape Horn from Galveston, Texas, to Long Beach, California was planned for the high seas. Additionally, the ship, the *T.T. Williamsburgh*, entered foreign territorial waters on August 4, 1980, at Curacao to load spot cargo. Finally, the administrative law judge found the parties agreed that claimant is entitled to workers' compensation under New York law should coverage under the Act be denied. We hold that on the facts of this case the administrative law judge rationally relied on the factors enunciated by the Second Circuit in *Cove Tankers*, namely the planned nature of the *T.T. Williamsburgh*'s voyage on the high seas, its stop in foreign territorial waters, and employer's voluntary payment of workers' compensation benefits under the laws of New York state, to find that the situs element was not satisfied in the instant case. Accordingly, we reject claimant's contention and affirm the administrative law judge's denial of coverage.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

/s/R P Smith
ROY P. SMITH, Acting Chief
Administrative Appeals Judge

/s/Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/s/Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

DATED THIS 31ST
DAY OF JULY 1989

APPENDIX H

Decision and Order of Administrative Law Judge, in the case of Spyridon Kollias, Dated November 15, 1985

DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE LEONARD N. LAWRENCE DATED NOVEMBER 15, 1985

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

SPYRIDON KOLLIAS,
Claimant

v.

D & G MARINE MAINTENANCE,
Employer

and

STATE INSURANCE FUND,
Carrier

Case No.
85-LHC-0045
OWCP No. 2-81213

VICTOR PASTERNACK, ESQ.
DANIEL MORRIN, ESQ.
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For the Claimant

RICHARD A. COOPER, ESQ.
Fischer Brothers
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New York, New York 10038
For the Employer/Carrier

Before: LEONARD N. LAWRENCE
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the "Act"). On June 20, 1985, a hearing was held in New York, New York.

Prior to the claim for compensation under the LHWCA, Claimant had prosecuted a third party liability action in the United States District Court for the S.D. of New York against Bay Tankers, Inc. et al. which included D&G Marine Ship Repair Company as a defendant. This action was brought under the Jones Act and general maritime law and it was determined that the Claimant was not entitled to any compensation thereunder because he was not a member of a crew but a maritime repairman, and an employee of the defendant in this action. The decision of the District Court was affirmed by the Second Circuit Court of Appeals.

The sole issue presented for determination in this case is the matter of jurisdiction.

The parties have agreed that the Claimant, a ship repairman, was injured on July 30, 1980, while aboard the T.T. Williamsburgh, a vessel which was approximately 1500 miles out on the high seas and away from the American mainland. The parties agree that the ship was not within the territorial waters of any nation except under the Claimant's theory, possibly within the territorial waters of the United States. The parties stipulated that if the Claimant were found to be within the jurisdiction of the LHWCA, the Claimant would be entitled to temporary total disability compensation from July 30, 1980 to June 29, 1984, and that the case could be remanded to the Deputy Commissioner for further proceedings in order to determine the extent of the claimant's permanent partial disability.

It is the contention of the Claimant, that he was covered under the LHWCA and that the decisions in the District Court and the Court of Appeals, preclude the Employer and Carrier from contesting coverage under the LHWCA. It is urged that these

decisions considered together establish that this case is within the jurisdiction of the LHWCA, and that therefore this becomes binding legal precedent under the principles of *stare decisis*, "the law of the case", collateral estoppel, etc. Indeed it is urged that on the basis of the United States Supreme Court's denial of its petition for certiorari, the Court has indicated its approval of the decisions below, and that therefore the principles enunciated have become the law of the land. The thrust of the Claimant's argument is that the decision in *Cove Tankers Corp. v. United Ship Repair, Inc.*, 683 F.2d 38 (2nd Cir. 1982) considered along with the 1972 amendments to the LHWCA, were designed in part to prevent workers walking in and out of coverage. While the 1972 amendments were concerned with the "landward" reach of the Act the decision in the case *Cove Tankers Corp.* focused on the "seaward" reach of the Act.

In *Cove*, two ship repairers were enroute from Philadelphia to New York when they were injured in an accident occurring while the ship was 130 miles offshore. Since the facts of the case seem to indicate that the ship had been "diverted" from its regular course, and in consideration of the intent of the 1972 amendments, it was decided that the claimant was covered by the LHWCA. It is contended that the facts in the instant claim are directly analogous to those in *Cove Tankers*, and language quoted in the *Kollias* case in which "mutually exclusive remedies" (LHWCA v. Jones Act) were mentioned, the Court extended the rule in *Cove Tankers* and applied it to the facts at bar, in essence finding "that a ship repairman aboard a vessel on the high seas is covered by the Act". Claimant goes on to argue that since the Court in *Kollias* was confined to deciding whether or not the case had been correctly decided within in the framework of the *Jones Act*, it did not have to "explicitly" state that the case came within the provisions of the LHWCA.

The Respondent replies that the rules respecting *stare decisis*, *collateral estoppel*, *res judicata* are not applicable herein because the issue of whether Claimant's accident satisfied the "*situs*" requirement set forth in Section 3(a) of the LHWCA was never raised in the liability proceedings, and was not necessary to the rendering of a decision in that matter, and was in fact, totally

irrelevant to the judgment on the causes of action alleged. Under the Jones Act, the situs of the accident is immaterial, but liability depends on the nature of the service rendered and its relationship to the operation of the vessel. No actual determination was rendered in *Kollias v. Bay Tankers* on the issue of situs, thus the principle of estoppel and bar, do not apply in this case. The principal of *stare decisis*, is also inapplicable as this applies only when a decision of the same legal problem is presented in a later case. The rule respecting the "law of the case" is also inapplicable as the instant proceedings are not a subsequent stage of the Jones Act litigation. Further, Respondent notes that the Court of Appeals decision itself contains a caveat that the opinion "shall not be reported, cited or otherwise used in unrelated cases before this or any other court". (Cl. Exh. 1 at 3A). "Res judicata" is inapplicable because this case is not premised upon the same cause of action as was asserted in the liability case. That doctrine requires that both actions involve the same parties. It should be noted that the claim against the Employer herein was dismissed at the Claimant's own request during the course of the trial and prior to the submission of the case to the jury. Accordingly, the Employer was not even a party to the *Kollias v. Bay Tankers* decision. Further, I agree with the analysis of the Respondent respecting the Court of Appeals' decision that the only possible course of action which would still be available to the Claimant, as a nonseaman in a liability forum, was a negligence action. This alternative was available to the Claimant whether or not he would ultimately be found to be outside the jurisdiction of the LHWCA. It is clear that the issue of situs was never litigated in the prior action, and the Respondent had no opportunity to litigate issues of LHWCA coverage in those proceedings, and that the Claimant's present effort to assert that the Jones Act Act proceeding is a bar to Respondent's controversion of the instant claim is unsupported by law.

The Respondent has emphasized certain facts to distinguish the instant case from that of *Cove Tankers*. In the instant case the ship was clearly in excess of 300 miles from the coast of the United States. Section 2(9) defines the United States as meaning "when used in a geographical sense . . , the several states and territories and the District of Columbia, including the territorial

waters thereof". A review of the legislative history surrounding the enactment of the 1927 LHWCA indicates that Congress rejected a proposal to include the "high seas" in favor of territorial (navigable) waters" and Congress did not alter this provision when it enacted the 1972 amendments. In *Cove Tankers*, the Court of Appeals held that under the "special facts of this case and the reading of the Act consistent with recent Supreme Court decisions" etc. "navigable waters, could be included in the high seas". The special facts of the case were noted by the Court and included the fact that the vessel was moving between two United States ports "with no deviation, scheduled or otherwise, into the territorial waters of any foreign nations." It is pointed out by the Respondent that in the instant case, unlike the situation in *Cove Tankers*, Claimant's injury occurred either on the high seas or foreign waters while enroute to a foreign port. The voyage herein clearly contemplated not only passage through foreign territorial waters, but arrival and loading and unloading of cargo at a foreign port. The vessel was being routed between a United States port and a foreign port, then around Cape Horn to a United States port. Accordingly it would pass through the territorial waters of several foreign nations even if one were to discount entirely the first stop in Curacao.

Finally, it should be noted that part of the rationale in *Cove Tankers* was that the claimant would have no recourse to any workmens compensation system whereas in the instant case both parties agree that the Claimant would receive benefits under the New York State workers compensation law.

Conclusion

For all of the foregoing reasons, I find that the Claimant has failed to satisfy the requirements of Section 3(a) of the Act and accordingly, this claim for compensation benefits must be denied.

ORDER

It is hereby ORDERED that this claim be, and it hereby is, DENIED for lack of jurisdiction.

/s/ Leonard N Lawrence

LEONARD N. LAWRENCE
Administrative Law Judge

LNL/mml

Dated: NOV 15 1985
Washington, D.C.

APPENDIX I

Decision and Order of Administrative Law Judge, in the case of Eleftherios Gouvatsos, Dated October 9, 1984

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
	:	
ELEFTHERIOS GOUVATSOS Claimant	:	Case No. 81-LHCA-136
	:	
v.	:	OWCP No. 2-66242
	:	
B & A MARINE CO. Employer	:	
	:	
and	:	
	:	
STATE INSURANCE FUND Carrier	:	

Irving Bushlow, Esquire
For the Claimant

Joseph F. Mannes, Esquire
For the Employer

DECISION AND ORDER

History of the Case

At a calendar call held in New York the parties represented that the only issue between them was whether the injury occurred upon the navigeable waters of the United States. The parties asked that I consider the claim on the uncontested record and briefs to be submitted by them. I agreed to proceed as requested.

Upon consideration of the material submitted to me by the parties I concluded that the injury had occurred upon the navigeable waters of the United States. However, although the material submitted by the parties did establish that Claimant was injured in the course of his employment, it did not contain any evidence concerning Claimant's average weekly wage at the time of his injury nor the nature and extent of this injury. As I was therefore unable to issue an order awarding benefits I issued an order stating that unless I was given the facts and figures on which to base an award of benefits within 45 days I would remand the case to the deputy commissioner for a determination of these issues. The Employer appealed my finding of jurisdiction to the Benefits Review Board. On August 23, 1982 the Brand dismissed the appeal on the ground that was premature in view of the fact that the parties had not supplied the facts necessary to resolve the questions of compensation and disability. Since then no further action has been taken either by the Board, this office or the parties.

The parties now have agreed that Claimant's weekly wage at the time of the injury was $524.61, that his injury on January 1, 1980 temporarily disabled him, that he continues so totally disabled and is entitled to compensation at the rate of $348.41 a week. The parties also agree that between January 2 and November 10, 1982 Claimant received $27,464.00 in Workmen's Compensation law of New York State and that this amount is to be set off against benefits payable to Claimant under the Act. Counsel for Claimant also filed an application for an attorney's fee of $7,500 to which the Employer has not objected.

Based upon the facts stated above I make the following:

Findings of Fact and Conclusions of Law

I. Jurisdiction

For the reasons stated in my Order of November 10, 1981, attached hereto, I find that Claimant was injured on the "navigeable waters" of the United States and that therefore his injury is compensable under the Act.

II. **Nature and Extent of Injury and Compensation Rate**

Claimant is temporarily totally disabled by his January 1, 1980 injury and continues temporarily totally disabled to this date. His average weekly wage at the time of the injury was $524.61 a week which entitles him to compensation at the rate of $348.41 a week.

III. **Attorney's Fee**

Counsel for Claimant has applied for an attorney's fee for $7,500 and supported this application with an affidavit as to time spent on this case. As the Employer has not objected to this fee and as this fee appears reasonable in light of quality representation and of the result obtained, I shall approve the application.

ORDER

The Employer shall pay:

I. To Claimant:

A. Compensation for temporary total disability at the rate of $348.41 a week from January 2, 1980 and continuing.

B. All medical expenses which Claimant has incurred in the past and may incur in the future by virtue of his January 1, 1980 injury.

C. Interest from the date on which any payment directed herein was due to the date such payment is actually made. For periods prior to October 1, 1982 the interest rate shall be 6 percent per annum. Beginning October 1, 1982 interest is payable at the rate prescribed by 28 U.S.C. 1961 which on this date is 11.36%.

In determining the amounts due under §§A and B above the Employer is to be credited with the $27,464.00 is has paid, for this injury under the Workman's Compensation law of the State of New York.

II. To Irving B. Bushlow the sum eof $7,500 for representation services.

/s/ Anastasia T. Dunau

ANASTASIA T. DUNAU
Administrative Law Judge

Dated: OCT 09 1984
Washington, D.C.

ATD:pas

Attachment

APPENDIX J

Order of Benefits Review Board, Dismissing the Appeal Without Prejudice, in the case of Eleftherios Gouvatsos, Dated August 23, 1982

BENEFITS REVIEW BOARD

U. S. DEPARTMENT OF LABOR

No.82-101

ELEFTHERIOS GOUVATSOS Claimant-Respondent v. B & A MARINE COMPANY and STATE INSURANCE FUND Employer/Carrier-Petitioners DIRECOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	FILED AS PART OF THE RECORD AUG 23 1982 (date) /s/ Agnes Kurtz Clerk Benefits Review Board ORDER

On July 9, 1982, the Director, Office of Workers' Compensation Programs, filed a Motion to Dismiss the above-cited case pointing out that the administrative law judge in her Decision and Order filed December 14, 1981, ordered the parties to submit within 45 days material necessary to determine the amount of compensation payable to claimant or to request further proceedings to make such a determination. The administrative law

judge further instructed that failure to make such a submission or request would result in remanding the case to the deputy commissioner.

Since the parties involved did not comply with the Decision and Order of the administrative law judge leaving the issues of compensation and disability unresolved, the appeal to the Board was premature. The Board hereby grants the Director's motion and dismisses the appeal without prejudice. 20 C.F.R. §802.401(b).

ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

/s/ Julius Miller
JULIUS MILLER
Administrative Appeals Judge

/s/ Ismene M. Kalaris
ISMENE M. KALARIS
Administrative Appeals Judge

Dated this 23rd
day of August 1982

APPENDIX K

Decision and Order of Administrative Law Judge, in the case of Eleftherios Gouvatsos, Dated December 3, 1981

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
ELEFTHERIOS GOUVATSOS	:	CASE NO.:
Claimant	:	81-LHCA-136
against	:	OWCP NO.: 2-66242
B & A MARINE CO.	:	
Employer	:	
and	:	
STATE INSURANCE FUND	:	
Carrier	:	

Irving Bushlow, Esq.
For the Claimant

Joseph F. Mannes, Esq.
For the Employer

Before: Anastasia T. Dunau
Administrative Law Judge

DECISION AND ORDER

STATEMENT OF THE CASE

This is a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* (hereinafter the Act). The Deputy Commissioner denied the

claim on the ground that it did not fall within the jurisdiction of the Act. At a calendar call held in New York on February 23, 1981 the parties agreed that the only question between them was whether the accident had occurred "upon the navigable waters of the United States" and was therefore covered by the Act. The parties agreed to submit this issue on briefs and no adjudicative hearing was held. On March 17, 1981 the parties executed a stipulation that the approximate location of the vessel *Amoco Corona* when the accident occurred was 22° 55 minutes north latitude and 94° 31 minutes west longitude. The parties are agreed that this location is more than 200 stationory miles off the nearest coast of the United States and is considered "high seas".

Findings of Fact and Conclusions of Law

FACTS

The *Amoco Corona* is a ship of Bermudan registry, Claimant is an employee of the Employer and the supervisor of a crew of four other employees who left the Employer's New York premises and boarded the *Amoco Corona* on December 14, 1978 in Texas City, Texas, for the purpose of making certain repairs.

Claimant stayed on board to complete the repairs when the ship left Texas City on December 15, 1979 for Bagaritos, Mexico and remained aboard for its return voyage, which began on December 30 across the Gulf of Mexico to Galveston Roads, Texas. While engaged in repair work on January 1, 1980, Claimant injured his right knee and leg. The *Amoco Corona* reached port in Galveston Roads on January 5, 1980.

DISCUSSION

The only issue before me at this point is whether a location on the high seas more than 200 statutory miles from the nearest United States coast and more than 200 miles away from any other nation is to be considered "navigable waters of the United States" for purposes of invoking coverage of section 3(a) of the Act. The Claimant contends and the Employer denies that "navigable waters" of the United States includes locations outside the territorial waters of the United States, i.e. the high seas.

While there is voluminous case law concerning the landward extent of the Act's jurisdiction there was until September 10,

1981 an almost complete dearth of case law concerning the seaward extension of such jurisdiction. On that day Judge Sand decided *Cove Tanker's Corp., v. United Ship Repair*, 80 CIV 4196 (D.C.S.D.N.Y.A.) in United States District Court for the Southern District of New York. In an exhaustive, extremely well reasoned and documented opinion Judge Sand concluded that the Act does apply to injuries sustained on the high seas by ship repairmen in the course of their employment. I agree with and adopt Judge Sand's rationale and conclusions concerning the Act's seaward jurisdiction and will not repeat them in detail here but shall set forth the reasons for my agreement.

There is no question that Claimant meets the status part of the situs and status test for jurisdiction. He is a ship repairman who was injured while repairing a ship. There is also no question that if compensation under the Act is unavailable his injuries and those of other ship repairmen who are injured or killed on the high seas while plying their trade cannot be compensated by any of the compensation statutes of the United States or the individual States.[1] In view of the often expressed intent of Congress, particularly that shown in the passage of the 1972 Amendments of the Act, to cover all maritime employees, exclusion of ship repairmen injured or killed on the high seas from coverage of the Act, would have to be required by unequivocal language and should not be read into the Act via refined and sophisticated statutory construction of ambiguous language. I find no unambiguous command to exclude here[2], on the contrary

---

[1] State Workmen's Compensation laws may not constitutionally be extended to navigable waters of the United States. *See Sunship-Building Co. v. Pennsylvania*, 447 U.S. 715 (1980); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1977); *Parker v. Motor Boot Sales*, 314 U.S. 244 (1941). The Jones Act, 46 U.S.C. 688, and the Death on the High Seas Act 46 U.S.C. 761 apply only to members of a ship's crew.

[2] For a case where the language of the Act was so clear that it commanded a result contrary to its remedial purpose see the Supreme Court decision in *Potomac Electric Power Co. v. Director, OWCP*, 101 S. CT. 509 (1980). The difference between the clarity of the statutory command in *Potomac* and that which the Employer seeks to find here is abundantly clear.

language of the statute and its legislative history favor a construction which would include the high seas in the term "navigable waters of the United States".

Navigable water is not defined by the Act. Section 2(9) of the Act defines "United States" "when used in a geographical sense" as "the several States and Territories and the District of Columbia including the territorial waters thereof". As there is no indication whether §2(4) and 3(a) of the Act use "United States" in a geographical sense the definition of §2(9) of "United States" contributes nothing to the solution of the problem here. The primary purposes of use of "United States" appear to be to preclude application of the Act into the navigable waters of other Nations and to define Federal versus State jurisdiction. See *Cove Tanker* pp. 10-12.

It must be remembered that when the Act was passed originally in 1927 the power of the national government under the Constitution of the United States was considered to be much more limited vis-a-vis the several States than it has been found to be by post-New Deal Supreme Court decisions. In making the Act applicable to the waters of the navigable United States Congress was asserting the power of the federal government against the States, i.e. Congress was concerned with the landward, rather then the seaward extent of the Act. See *Cove Tanker* slip op. p. 8. Had Congress been concerned with limiting the seaward extent it could very well have limited the jurisdictional provisions to the navigable territorial waters of the United States. It is significant that Congress did not do so explicity and there is nothing in the Act that would require reading "territorial" into the jurisdictional provisions of the Act.

The Employer relies heavily on the fact that the original Senate bill (S 3107, 69th Congress, 1st. Sess.) defined jurisdiction as "upon the navigable waters of the United States (including any dry dock) or occurring while such employee was employed on board a vessel of the United States upon the high seas" but that the bill as finally passed had excised all language past "United States". I do not believe that this excision establishes that "high seas" was to be excluded from the jurisdiction of the

Act. As the court points out in *Cove Tanker* (slip opinion pp 12-15) the excision of the "high seas" phrase in the coverage section was part of a conciliation of the coverage provisions between the Senate and House bills where the Senate version had included coverage of masters and crews. The Legislative history provides no clue as to why the phrase "high seas" was excised.

While Congress excised "high seas" from the coverage provisions it enacted section 39(b) which empowers the Secretary of Labor "to establish compensation districts, to include the *high seas* and the areas within the United States in which the Act applies..." and which provides" for the institution of judicial proceedings under section 18 and 21 of the Act [providing for enforcement after default of payments or afteer disobedience of order to pay compensation] in respect to *"injury or death occurring on the high seas"* in the district of the Deputy Commissioner whose office has jurisdiction of the claim. (emphasis added) I find much more significance in the continued retention in the Act up to the present of provisions assuring compensation for injury and death on the high seas than I do in the 1927 excision. If the Employer's view of coverage were correct there would be absolutely no need for the phrase "high seas". Reading that phrase out of the statute would be entirely contrary to the well recognized principle of statutory construction that nothing is to be considered suplusage unless other parts of the statute clearly so indicate. 82 C.S.S. States §316 (1953)

The Employer also seeks support for its view in the Submerged Lands Act 43 U.S. 1301 *et seq*, SLA, which in Section 1301(b) defines land under navigable waters as submerged land which is not further removed from the United States coast than three statutory miles. A close look at all of the definitions in Section 1301 makes it clear that what is being defined is the submerged land area covered by the Act rather than "navigable waters". Engrafting the definition of "navigable waters" the SLA onto the Act would violate two well established principles of statutory construction which prohibit engrafting the provisions of one statute upon those of another where (1) such engrafting narrows the compass of one statute by reference to another which does not expressley repeal or conflict with the statute to be

construed and (2) is contrary to legislative intent. CJS *Statutes* §366(b) (1953). As reading the SLA definition into the Act would considerably narrow the scope of the Act without language in the SLA to authorize such narrowing the first of these principles would clearly be violated if the definition of "navigable waters" of the SLA were read into the Act.

Reading the SLA definition of navigable waters into the Act is also demonstrably against the expressed intent of Congress. When Congress in 1953 extended the compensation provisions of the 1927 Act to offshore oil and mine workers by enacting the Outer Continental Shelf Lands Act 43 U.S.C. 1331 et seq. Congress defined the latter statute's situs jurisdiction by adopting by reference the situs definition of the SLA rather than keeping that of the Act itself. By doing so Congress clearly indicated that it did not consider the situs definitions of the Act and those of the SLA to be the same.

CONCLUSION

As the parties agreed that Claimant was injured and that the injury occurred in the course of his employment Claimant is entitled to benefits. The record, however, contains no evidence concerning the extent and nature of the injury, the nature and duration of the impairment, and the average weekly wage Claimant was earning at the time of the injury. I therefore shall keep the record open for 45 days after the date of this order for the parties to stipulate, submit evidence or request further proceedings to determine the amount of compensation payable. If the parties fail to take action as requested herein I shall remand the claim to the Deputy Commissioner for the making of an appropriate award.

ORDER

Claimant and the Employer Carrier are hereby ordered to submit within 45 days of this Order material necessary to determine the amount of compensation payable to Claimant herein or to request further proceedings to make such a determination.

Failure to make such a submission or request will result in my remanding the case to the Deputy Commissioner.

/s/ Anastasia T. Dunau

ANASTASIA T. DUNAU
Administrative Law Judge

AD:gg

DEC 03 1981

APPENDIX L

Statutory Provision Involved

§903 Coverage

(a) Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).